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Supreme Court, U.S.
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In The

Supreme Court of the United States

TAM TRAVEL, INC., *et al.*,

Petitioners,

v.

DELTA AIR LINES, INC., *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. To satisfy the pleading requirements of *Bell Atl. Corp. v. Twombly* and allege a "plausible" price-fixing conspiracy in violation of Section 1 of the Sherman Act, must a complaint allege facts that "tend to exclude the possibility that defendants acted independently"?

2. In a continuing conspiracy among purchasers to fix artificially low prices for the services they buy, does a conspirator commit an "overt act" each time it purchases the price-fixed service at the artificially low conspiracy rate?

PARTIES TO THE PROCEEDINGS

Petitioners in this Court, plaintiffs-appellants below, are Tam Travel, Inc. d/b/a Tamalpais Travel; Travel Goddess, Inc. d/b/a Uniglobe Happy Travel; MZZO, Inc. d/b/a Beyond Travel; Bonanza World Travel, Inc.; TJ Kap, Inc. d/b/a Master Kilby's Travel d/b/a Sportsman's Travel d/b/a Master Travel; A Team Travel, Inc. d/b/a A Team Travel; A&W Travel, Inc.; Katherine Arcell, an individual; Christine Whalen, an individual; Brenda K. Davis and Associates, Inc. d/b/a All Destinations Travel; Allways Travel, Inc.; Breton Village Travel Services, Inc. d/b/a Eastlake Travel Services; Eastlake Travel Services, Inc.; Village Travel Services, Inc.; Adventure Travel, Inc. d/b/a Carlson Wagonlit Travel; Garavanian Travel, Inc. d/b/a Carlson Wagonlit Travel; Talson, Inc. d/b/a Carlson Wagonlit Travel d/b/a Travel Agents International; Compass Ltd. d/b/a Ambassador Travel; Deluxe Travel, LLC d/b/a Deluxe Travel Ltd.; Destinations, Inc. d/b/a Destinations, Inc., A Travel Company; Excel Travel, Inc.; ETC Holdings, Ltd. d/b/a Executive Travel Consultants, Ltd.; Rozanne Kunstle, an individual d/b/a Express Travel; Steven Kunstle, an individual d/b/a Express Travel; Gidden, Inc. d/b/a Express Travel; Five Star Travel, Inc.; CBD, Inc. d/b/a A Better Way Travel Service d/b/a A Better Way Travel d/b/a A Better Way Travel Service d/b/a Garden of the Gods Travel Service d/b/a Garden of the Gods Travel d/b/a Garden of the Gods Travel Agency; John R. Denny, an individual, d/b/a Garden of the

PARTIES TO THE PROCEEDINGS - Continued

Gods Travel, d/b/a Garden of the Gods Travel Service, d/b/a A Better Way Travel, d/b/a A Better Way Travel Service; Y. Jocelyn Gardner, a sole proprietor d/b/a Gateway Travel and Cruises, Inc. d/b/a Gateway Travel Services; Gateway Travel and Cruises, Inc.; Gateway Travel, Inc. d/b/a Gateway Travel and Cruises; Lago Travel, Inc.; Mad Travel, Inc.; Marina Benz, an individual; Camelot Tours, Inc. d/b/a Marina's Travel; Rosemary D'Augusta, an individual d/b/a Perna Travel Service d/b/a Perna Golf Adventures d/b/a Travelbroker.com; Professional-World Travel, Inc.; Red Bird Travel Service, Inc. d/b/a Red Bird Travel Plus; Go Everywhere, Inc. d/b/a Riverside Travel Group d/b/a Riverside Travel; Rubinsohn Travel, Inc. d/b/a Rubinsohn Travel Service; Sondra Russell, an individual d/b/a Sandy's Get Away Travel; Silhouette Travel, Inc.; June Stansbury, an individual d/b/a Stansbury Travel d/b/a Stansbury Sterling Travel; Stansbury Travel, Ltd.; Stansbury Travel, LLC; Nancy Walker and J. Michael Walker, a partnership d/b/a Sunset Travel; UAT, Inc. d/b/a The Travel Store; Thomas Travel of American Fork, Inc.; Tour West Travel of American Fork, Inc.; LWK Corporation d/b/a Tennessee Valley Travel Agency; Imperial Travel by Dana, LLC d/b/a Universal Travel; Travel by Dana, Inc.; Destinations Resort Reservations, Inc. d/b/a Greenwood Travel; The Travel Center, Inc.; Carolyn Fjord, an individual d/b/a Travel Express; Travel King, Inc.; Lee Gentry, an individual

PARTIES TO THE PROCEEDINGS – Continued

d/b/a Travel King; Nancy Riesch, an individual d/b/a Travel Plus; Travel Plus, NAR, Inc. d/b/a Travel Plus; Travel Professionals, Inc.; Travel Travel, Inc. d/b/a Travel Travel Erindale Sq.; WNMP Travel, Inc. d/b/a Uniglobe Professional Travel; Vidal Travel, Inc.; Talgood Enterprises, Inc. d/b/a Talgood Travel; World Traveler, Inc. d/b/a Summerlin Travel d/b/a Carlson Wagonlit Summerlin Travel d/b/a Green Valley Travel d/b/a Carlson Wagonlit Green Valley Travel; World Travelers, Inc. d/b/a Travel, Inc. d/b/a Carlson Wagonlit Travel/Travel, Inc. d/b/a Summerlin Travel d/b/a Carlson Wagonlit Summerlin Travel d/b/a Green Valley Travel d/b/a Carlson Wagonlit Green Valley Travel; Satellite Travel Systems, Inc.

Respondents in this Court, defendants-appellees below, are American Airlines, Inc.; Continental Airlines, Inc.; and United Air Lines, Inc.

The following airlines are not parties here, but were defendants-appellees below: Alaska Air Group, Inc.; Alaska Airlines, Inc.; Horizon Industries, Inc.; America West Airlines, Inc.; ATA Airlines, Inc.; Hawaiian Airlines, Inc.; Air Canada; Delta Air Lines, Inc.; Northwest Airlines, Inc.; KLM Royal Dutch Airlines; US Airways, Inc.; and US Airways Group, Inc.

While the appeal below was pending, defendant-appellees Frontier Airlines, Inc. and ATA Airlines,

PARTIES TO THE PROCEEDINGS – Continued

Inc. filed petitions for relief under Chapter 11 of the bankruptcy code and this appeal has been held in abeyance as to those airlines only.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, no petitioner has a parent company and no publicly held company owns 10% or more of any petitioner's stock.

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Petitioners respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 583 F.3d 896. Appendix to Petition for Writ of Certiorari ("App.") 1a-42a. The opinion of the district court (App. 44a-71a) is unreported.

JURISDICTION

The Court of Appeals entered its judgment on October 2, 2009. App. 43a. The court denied a timely petition for rehearing with a suggestion for rehearing en banc on December 18, 2009. App. 72a-73a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 1 of the Sherman Act, 15 U.S.C. § 1, provides in relevant part: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal."

STATEMENT OF THE CASE

In *Bell Atlantic Corp. v. Twombly*, 550 U.S. 554 (2007), this Court granted certiorari to address the sufficiency of pleading a price-fixing conspiracy in violation of Section 1 of the Sherman Act, establishing the now famous "plausibility standard." *Id.* at 556. Two years later, the Court clarified its decision in *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1950 (2009), explaining that in order to state a claim for antitrust conspiracy, a complaint fails if it merely alleges that the defendants acted in parallel. This case represents the next step in the refinement of the Court's new standard. Whereas *Twombly* and *Iqbal* offer examples of complaints that fail to demonstrate plausibility, the complaint here presents the Court an opportunity to further shape the standard's boundaries using allegations that plausibly suggest conspiracy.

In *Twombly*, the plaintiff supported its conspiracy allegation merely by alleging that the defendants acted in parallel. But the Court – observing that "parallel conduct *without more*" is as consistent with competitive behavior as it is with conspiratorial behavior – held that a complaint must also plead facts that place the parallel conduct "in a context that raises a suggestion of a preceding agreement." *Twombly*, 550 U.S. at 557. Here, the complaint readily surmounts the *Twombly* requirement, alleging – among other facts – the specific dates, participants, and locations of meetings among the defendants where they discussed and voted to fix prices immediately before the prices simultaneously

increased. In the dissent's view, the complaint "creates an overwhelming case for the plaintiff to get by a motion to dismiss on the pleading," "so plain a case that [the defendants] might as well have put the plan in writing." App. 35a-36a. But, relying on summary judgment law, the majority contorted *Twombly*'s observation about "parallel conduct, without more" and misread that case and *Iqbal* as issuing a license for lower courts to determine, for themselves, whether the parallel conduct was "more likely explained by" the complaint's allegations or by the defendants' innocent explanations. By applying summary judgment law to the complaint – which requires evidence that "tends to exclude the possibility that defendants acted independently" – the Sixth Circuit crafted a new rule that flies in the face of *Twombly*'s admonitions not to "impose a probability requirement" or "apply a heightened pleading standard." 550 U.S. at 556, 569 n. 14.

The Sixth Circuit's wayward interpretation of the plausibility standard also directly conflicts with a decision from the Second Circuit that flatly rejected the same rule adopted by the court below. The holding here also conflicts with the reasoning of decisions from the Third, Ninth and District of Columbia Circuits, all of which have correctly interpreted the *Twombly* standard. It is no secret that the lower courts, especially the trial courts, have struggled with understanding the plausibility standard in *Twombly*, which has already been cited over 20,000 times in cases and comments. Even here, the

district court freely admitted to what it perceived to be a "contradiction" between *Twombly* and Rule 8's requirement of a "short plain statement." The Sixth Circuit's decision in this case will only serve to greatly increase this uncertainty. As the dissent below correctly observed, "[t]he uniformity needed for the rule of law and equal justice to prevail is lacking." App. 39a. This case, a price-fixing conspiracy case like *Twombly*, presents an ideal opportunity to bring consistency to the application of the plausibility standard.

The Sixth Circuit's decision also creates a conflict in the circuits concerning the law of continuing antitrust conspiracies, and it independently warrants this Court's review. Under *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321 (1971) and *Klehr v. A.O. Smith Corp.*, 521 U.S. 179 (1997), a new cause of action accrues each time the defendant transacts for a product or service at a price that has been set by an illegal agreement – even if the agreement itself is many years old. The Fourth and Eleventh Circuits have issued decisions in accord with this established law. But the Sixth Circuit, making its own policy choice, held that the defendants here did not commit "overt acts" when they purchased the plaintiffs' services at prices set by illegal conspiracy.

The Court should grant the petition and act decisively to reverse the decision below. If there is any doubt here about whether review should be

granted, the Court should invite the Solicitor General to express the views of the United States.

A. Factual Background

This case is brought by forty-nine independent travel agents and agencies ("Travel Agents") against sixteen passenger airlines ("Airlines"), alleging a continuing seven-year conspiracy to fix the commission rates paid by Airlines in return for travel services provided by the Travel Agents.

Before 1978, the passenger airline industry was regulated by the government, and travel agent commission rates were fixed at 7%. Vol. III Court of Appeals Joint Appendix ("Jt.App.") 666. However, once the industry was deregulated, free-market competition was allowed to thrive and commissions were driven up to over 10% as passenger airlines sought to increase their ticket sales and market shares. *Id.*

Travel agents have been an integral part of the airlines' sales strategy for many years. In 1999, travel agents booked over 80% of all domestic full-service tickets (III Jt.App. 700, 702), and during the time relevant to this case, travel agents continued to "write and/or influence the material percentage" of the airlines' business. III Jt.App. 657, 671. The airlines have traditionally paid commissions because they provide important incentives to travel agents, who will book more tickets on airlines that pay them for their services. Complaint ("Compl.") ¶¶ 88, 89; App. 111a-112a.

In 1981, three years into deregulation, United unilaterally cut travel agent commissions by imposing a flat fee for booked tickets. Compl. ¶ 83; App. 110a. However, the other airlines continued to pay competitive commission rates and refused to follow United's move. *Id.* As a result, United experienced business losses created by travel agents shifting business to those airlines that continued to pay for travel agent services. *Id.* Within five days of its enactment, United was forced to recant the commission cut in order to stem further sales losses. *Id.*

In 1983, American made a similar attempt, announcing a commission cut from 10% to 7%. Compl. ¶ 84; App. 110a. The response from the travel agent community was "vitriolic" and travel agents threatened to "book away" travel to other airlines that continued to pay commissions. *Id.* As economics would predict, no other airline followed American's commission cut. *Id.* To stem further losses, American recanted the cut because, according to Michael Gunn, the executive partly responsible for setting commission rates, "I felt I would lose a lot of revenue to my competitors by being noncompetitive on the commission front. . . ." III Jt.App. 669. Mr. Gunn testified that the commission reduction resulted in "damage" to American's "reputation with the travel agency community" that it was "not anxious" to repeat, since "travel agencies write and/or influence the material percentage of" airline travel. III Jt.App. 670-671.

American's president, Robert Crandall, was ultimately responsible for approving American's travel

agent commission rates. Compl. ¶ 23; App. 92a. Mr. Crandall has a history of attempted price-fixing. *Id.* In the mid-1980's, he was implicated in a price-fixing and monopoly conspiracy case brought by the Department of Justice in which he was caught on audio tape attempting to fix prices with his competitor, Braniff Airlines' president Howard Putnam:

> Crandall: I have a suggestion for you. Raise your goddamn fares twenty percent. I'll raise mine the next morning.
>
> Putnam: Robert, we –
>
> Crandall: You'll make more money and I will too.
>
> Putnam: We can't talk about pricing.
>
> Crandall: Oh bullsh**, Howard. We can talk about any goddamn thing we want to talk about.

Compl. ¶ 23; App. 92a; *United States v. Am. Airlines, Inc.*, 743 F.2d 1114, 1116 (5th Cir. 1984). Twice in this case, in 1995 and 1997, Mr. Crandall would approve American's commission cuts using the same modus operandi of following the leader "the next morning."

The conspiracy alleged in this case began in 1995 when Delta capped commissions at $25. Compl. ¶ 26; App. 93a. A commission "cap," rather than a percentage reduction, was a significant departure from normal business practice. Compl. ¶ 104; App. 116a. In fact, so unusual was Delta's proposed commission

structure that Mr. Gunn testified that the day Delta announced its cut, he had "never done any analytical analysis predicated on such a structure." III Jt.App. 696. Mr. Gunn's boss, Mr. Crandall, nevertheless authorized American to match Delta's move "the next morning" – just as he had illicitly proposed to Braniff.[1] Compl. ¶ 103; App. 115a-116a; III Jt.App. 699, 531-532. United and Continental, among other major airlines, followed Delta's lead within days. Compl. ¶¶ 31, 104; App. 94a, 116a. The speed at which the Airlines followed Delta's commission cut did not allow them the time necessary to independently determine whether the move was financially sound. Compl. ¶ 103; App. 115a-116a.

The conspiracy continued into 1997. On May 27 and 28, 1997 at a meeting of the International Air Transport Association ("IATA") in Montreal Canada, representatives from United, Delta, KLM, Air Canada and others discussed whether they should agree to lower commissions paid to travel agents outside the United States. Compl. ¶ 97; App. 113a-114a. At this meeting, the Airlines "communicated with one another for the purpose of developing . . . [and] implementing . . . their common plan to reduce, cap and eliminate

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[1] At around the same time, the Airlines settled a case alleging a price-fixing conspiracy among the Airlines involving the use of computer reservation systems to signal ticket price changes. Compl. ¶ 24; App. 92a-93a. The Department of Justice is currently investigating other price-fixing conspiracies involving many of the airlines here. Compl. ¶ 25; App. 93a.

commissions. . . ." Compl. ¶ 91; App. 112a. A few months later, United announced a commission reduction from 10% to 8%. Compl. ¶ 34; App. 95a. Notably, United made its cut effective the next day, preventing it from "waiting and seeing" whether the other Airlines would follow. *Id.* Two business days later, American and Delta matched the cut precisely, also effective the same day. Compl. ¶¶ 35, 36; App. 95a-96a. Mr. Crandall again authorized American's move. III Jt.App. 531-532. Northwest followed the next day and Continental the day after that. Compl. ¶¶ 37-38; App. 96a. The Airlines followed United's cut before they would have been able to rationally analyze whether the commission cut was economically beneficial. Compl. ¶¶ 37-42, 46; App. 96a-97a, 98a-99a.

In July, 1998 representatives responsible for setting the travel agent commission rates for American, United, Air Canada, Delta, Northwest and others met in Singapore at an IATA meeting at which they discussed, voted on and agreed to fix travel agent commissions at 9% in markets outside the United States. Compl. ¶ 98; App. 114a. At this meeting, the Airlines communicated with one another "for the purpose of developing [and] implementing . . . their common plan. . . ." Compl. ¶ 91; App. 112a. Four months later, United announced a commission cap which became effective the same day. Compl. ¶ 44; App. 98a. Three days later, again like 1997, American and Delta followed suit. Compl. ¶¶ 45-46; App. 98a-99a. Continental joined three days after that. Compl. ¶ 47; App. 99a. The speed at which American, Delta and

Continental followed United's reduction did not allow each airline the time necessary to make a rational independent decision. Compl. ¶ 103; App. 115a-116a.

In August, 1999 representatives responsible for setting travel agent commissions for United, Air Canada, American, Delta, KLM, and Northwest among others, met in Montreal, Canada at an IATA meeting to discuss setting travel agent commissions. Compl. ¶ 101; App. 115a. There, the group *voted* and agreed *to stop paying commissions as a group* to travel agents outside the United States. *Id.* At roughly the same time, representatives for American, United, Continental, Delta, and Northwest formed Orbitz, an online ticketing website that competes against travel agents. Compl. ¶ 99; 114a. The executives representing the various airlines on Orbitz's board of directors were the same executives responsible for setting their respective airline's commission rates. *Id.* They met once every two months. III Jt.App. 533-538, 559. Three months later, as in the past, United led a commission reduction in the United States from 8% to 5%, effective the following day. Compl. ¶ 51; App. 100a. Once again, American matched within 24 hours. Compl. ¶ 52; App. 100a. Continental and Delta followed within four days. Compl. ¶¶ 53-56; 100a-102a. The Airlines acted so closely in time that they could not have been able to independently assess whether following the commission reduction was in their best interest. Compl. ¶ 103; App. 115a-116a.

In April, 2001, the American and Delta representatives responsible for setting travel agent commissions met in Las Vegas, where they spent two or more days together, alone on a golf course. Compl. ¶ 102; App. 115a; III Jt.App. 537, 546, 564-565. Four months later, American announced a commission cap effective the following day, and Delta was the first to follow three business days later. Compl. ¶¶ 61-63; App. 103a-104a. It was the first time American had led a commission cut since its failed attempt almost two decades earlier in 1983. Compl. ¶ 23; App. 92a. United matched the commission cap the same day as Delta, and Continental followed 4 days later. Compl. ¶¶ 62, 65; App. 103a-104a.

Delta led the ultimate elimination of commissions in March, 2002. Tellingly, other Airlines knew Delta would eliminate commissions before it was announced. On March 4, 2002 in San Francisco, a representative of Orbitz told a travel agent that "something big is about to happen that will make Orbitz number 1." Compl. ¶ 108; App. 116a-117a. Around the same time, a sales representative of *United* told several travel agents that *Delta* was about to eliminate commissions. Compl. ¶ 107; App. 116a. On March 14, 2002 Delta announced the elimination of commissions, from 5% to 0%, effective the same day. Compl. ¶ 71; App. 106a. American and Continental matched the next business day. Compl. ¶¶ 72, 75; App. 106a-108a. United followed two days later. Compl. ¶ 73; App. 107a.

Having created, implemented and enjoyed the fruits of their conspiracy, some of the Airlines filed for voluntary bankruptcy under Chapter 11 of the Bankruptcy Code.[2] Compl. ¶¶ 109-116; App. 117a-118a. However, when they emerged from bankruptcy, these airlines continued to participate in the conspiracy by continuing to accept Travel Agents' services without paying for them. Compl. ¶¶ 117-119; App. 118a. At no time did any of these airlines affirmatively disavow the conspiracy or take any action to withdraw from it. Compl. ¶ 119; App. 118a.

B. The Lower Courts' Rulings

The Travel Agents sued under Section 1 of the Sherman Act, 15 U.S.C. § 1, alleging the Airlines conspired to cut and eventually eliminate the payment of commissions. As was their right under the federal rules, Travel Agents opted out of a putative class action captioned *Hall v. United Air Lines, Inc.*, 296 F.Supp.2d 652 (E.D.N.C. 2003), which alleged a conspiracy to cut and eliminate commissions based on the same facts as the present case. The *Hall* case involved extensive discovery, including some twenty or more depositions and over one million pages of documentary discovery. Although *Hall* was ultimately dismissed at summary judgment, Travel Agents opted out of that case well before any disposition. The allegations in Travel Agents' complaint are based

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[2] Relevant on this appeal is United.

largely on factual revelations – including specific meeting times, places, participants, and topics discussed – gleaned from the many depositions, meeting minutes, notes, presentations and other evidence from the *Hall* discovery.

Airlines answered the complaint and limited discovery ensued.[3] In June, 2007 Airlines filed a motion for judgment on the pleadings, asserting the complaint failed to meet the standard of this Court's *Twombly* decision, issued the previous month. The district court directed Travel Agents to file an amended complaint in light of *Twombly* and Airlines' motions were renewed.

The district court granted Airlines' motions, holding that the allegations failed to satisfy the *Twombly* standard. However, the district court admitted to some confusion about *Twombly*'s parameters, openly questioning the vitality of Rule 8's "short plain statement" and stating "although the Supreme Court says Rule 8 still exists, I think there is a contradiction in the case. . . ." III Jt.App. 778. Seemingly persuaded by the plaintiffs' failure in *Hall* rather than the sufficiency of the allegations, the district

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[3] To prevent duplication of the *Hall* discovery, the district court limited document production to that already compiled in *Hall* and depositions were limited to one "decision-maker" per airline. Travel Agents were only allowed to take one deposition before dismissal. I Jt.App. 105 (District Court's Order on Motion to Stay Discovery, p. 2); I Jt.App. 106-108 (District Court's Order on Motion to Compel Discovery, pp. 1-3).

court dismembered each group of allegations. First, isolating the parallel conduct allegations, it held them "*alone* not enough to meet the requirements under *Twombly*." App. 64a (emphasis added). Second, isolating the meeting allegations – which depicted the specific time, place, and person involved in meetings that immediately preceded each commission cut – the district court held that "opportunity to conspire, without more, does not suggest that there was an agreement to reduce commissions." App. 66a. Third, the complaint alleged that the Airlines' actions would only be economically rational if they acted in concert. To that, the district court held that Travel Agents' allegation "is not grounded in fact" (App. 66a), because it "only rel[ies] on United and American's failed attempt to institute commission reductions in the 1980's." App. 66a. Fourth, the court found that Mr. Gunn's "deposition testimony indicates that . . . there was no agreement or conspiracy." App. 68a-69a.

The district court also held that the claim must be dismissed as to the previously-bankrupt airlines. It reasoned that the last overt act committed by these airlines was the pre-bankruptcy "commission reduction" of March, 2002 (App. 59a); therefore, the claim "has been discharged by the bankruptcy court." App. 55a. The court held that "even if the airlines continued to participate in the conspiracy alleged by plaintiffs after having emerged from bankruptcy, that fact alone would not give rise to a new antitrust claim." App. 58a.

In a 2-1 decision, the Sixth Circuit affirmed. The majority opinion began its analysis of the complaint by citing *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752 (1984), a summary judgment case. App. 22a. Quoting *Monsanto*, 465 U.S. at 768, the majority wrote:

> The correct standard is that there must be evidence that tends to exclude the possibility of *independent* action. . . .

App. 22a (emphasis in majority opinion). The majority also cited the legal standard from its decision in *Re/Max Int'l, Inc. v. Realty One, Inc.*, 173 F.3d 995 (6th Cir. 1999), another summary judgment case. The majority justified its reliance on summary judgment law by claiming it was necessary to interpret *Twombly*, writing "it illuminates the plausibility of defendants' lawful, unchoreographed free-market behavior." App. 23a, n. 7. Thus, rather than analyze the plausibility of the conspiracy inference based on allegations in the complaint – as *Twombly* required – the majority instead analyzed the plausibility of defendants' innocent explanations.[4] Giving evidentiary weight to these explanations, the majority proclaimed them to be "especially plausible" (App. 25a) and found that "defendants have offered a reasonable, alternative explanation for their parallel pricing behavior." *Id.*

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[4] These "explanations" consist of factual accounts found in the Airlines' motion to dismiss briefs that purport to explain the Airlines' behavior as "innocent."

Ultimately finding the Airlines' explanations more persuasive than the allegations in the complaint, the majority concluded: "[b]ased on these facts, we conclude that each defendant had a reasonable, independent economic interest in adopting a competitor's commission cut rather than to maintain the status quo." App. 26a. Distilling its analysis into a legal rule, it held:

> We therefore hold that plaintiffs have failed to allege sufficient facts plausibly suggesting (not merely consistent with) an agreement in violation of § 1 of the Sherman Act because defendants' conduct was not only compatible with, but instead was more likely explained by, lawful, unchoreographed free-market behavior.

App. 26a (citation omitted).

With respect to the previously-bankrupt Airlines, the Sixth Circuit recognized the "continuing conspiracy" doctrine in antitrust law, and that a new cause of action accrues with the commission of each overt act. App. 10a-11a. The court conceded that the purchase of a price-fixed product is, as a matter of law, an overt act. *Id.* The lower court further recognized that a violation begun pre-bankruptcy can continue post-bankruptcy if overt acts are committed after discharge. *Id.* Nevertheless, it held the Airlines had committed no overt acts post-bankruptcy, since each time they accepted Travel Agents' services without paying for them, the Airlines were "merely reaffirm[ing] a

previous act," and not committing a new act. App. 11a.

Judge Merritt dissented, concluding that "[t]he factual allegations in this case create an overwhelming case for the plaintiff to get by a motion to dismiss on the pleading." App. 35a-36a. Describing the complaint, he determined that "the facts alleged present so plain a case that [the Airlines] might as well have put the plan in writing" – "[n]ot as strong as allegations raising an inference that 'the sun will rise in the morning' based on history, but strong enough to be more than 'plausible.'" App. 36a. The complaint included "specific, time-and-place factual allegations" that the Airlines "met frequently over the period the airlines were acting in unison and according to plan." App. 37a. Judge Merritt correctly noted that the complaint "provides specific times and locations of numerous meetings attended by the defendants . . . and most importantly, the complaint ties the dates of those meetings with industry-wide simultaneous rate cuts that followed immediately thereafter." App. 38a. He concluded, "[r]eading these allegations as a whole, the complaint clearly satisfies the *Twombly* standard." The dissent specifically criticized the majority's application of the wrong legal standard:

> Here my colleagues have seriously misapplied the new standard by requiring not simple "plausibility," but by requiring the plaintiff to present at the pleading stage a strong probability of winning the case and

> excluding any possibility that the defendants acted independently and not in unison.

App. 34a. Noting the numerous incidents of *Twombly*'s misapplication in the lower courts, the dissent called upon this Court to "make it clear that *Twombly* may not be used, as my colleagues propose, as a cover for repealing" the antitrust laws. App. 42a.

REASONS FOR GRANTING THE PETITION

I. Review Is Warranted To Resolve A Conflict Between The Sixth Circuit's Decision And Decisions From The Second Circuit And This Court Regarding An Important And Recurring Issue Of Antitrust Conspiracy Pleading

According to the Sixth Circuit's new rule, if a complaint satisfies *Twombly* by alleging facts placing the defendants' parallel behavior "in a context that raises a suggestion of preceding agreement," *Twombly*, 550 U.S. at 557, the complaint must nevertheless be dismissed unless it also "tends to exclude the possibility of independent action." App. 22a (citing *Monsanto*, 465 U.S. at 768).

The Second Circuit created a direct conflict with this rule when it flatly rejected it in *Starr v. Sony BMG Entm't*, 08-5637, 2010 U.S.App.LEXIS 768, *24 (2nd Cir. 2010), where it held: "[d]efendants . . . argue that a [Sherman Act] plaintiff must allege facts that 'tend[ ] to exclude independent self-interested conduct

as an explanation for defendants' parallel behavior. This is incorrect."

The rule below also directly conflicts with specific pronouncements of this Court. Relying on the *Monsanto* summary judgment standard, the Sixth Circuit held that Travel Agents' complaint failed to allege a plausible conspiracy because "defendants' conduct" was "more likely explained by" Airlines' innocent explanations than by the complaint's well-pled allegations. App. 26a. This holding relies on a subtle, but meaningful, misquotation from *Iqbal* that results in a grave misapplication of *Twombly*. By requiring the complaint to show that defendants' behavior was "more likely explained by" illegal conduct than by innocent conduct, the Sixth Circuit's rule demands a showing of probability. It therefore directly conflicts with *Twombly*'s admonition "not [to] impose a probability requirement at the pleading stage" or to "apply any 'heightened' pleading standard." *Twombly*, 550 U.S. at 556, 569, n. 14.

A. The Sixth Circuit's New Pleading Rule Directly Conflicts With Decisions Of The Second Circuit And This Court, And It Conflicts In Principle With Decisions From The Third, Ninth, And D.C. Circuits

The "crucial question" in a Section 1 case is whether the challenged conduct "stem[s] from independent decision or from an agreement, tacit or express." *Theatre Enters., Inc. v. Paramount Film*

Distrib. Corp., 346 U.S. 537, 540 (1954). "[T]he law does not require the proof of conspiracy by direct and positive proof" because "[c]onspirators do not put their agreements in writing. . . ." *Lawlor v. Loewe*, 209 F. 721, 725 (2nd Cir. 1913), *aff'd*, 235 U.S. 522 (1915). Rather, a conspiracy may be proven entirely through circumstantial evidence. *Am. Tobacco Co. v. United States*, 328 U.S. 781, 810 (1946). Allegations of defendants' "parallel conduct" (e.g., similar pricing or other market behavior) is circumstantial evidence that may be used to support a conspiracy claim. However, "[w]hile a showing of parallel business behavior is admissible circumstantial evidence from which the fact finder may infer agreement, it falls short of conclusively establishing agreement. . . ." *Twombly*, 550 U.S. at 553.

The complaint in *Twombly* "proceed[ed] exclusively via allegations of parallel conduct." *Twombly*, 550 U.S. at 565, n. 11. And while "an allegation of parallel conduct . . . gets the complaint close to stating a claim," "[w]ithout more, parallel conduct does not suggest conspiracy." *Id.* at 556-557. The Court held: "when allegations of parallel conduct are set out in order to make a § 1 claim, they must be placed in a context that raises a suggestion of a preceding agreement, not merely parallel conduct that could just as well be independent action." *Id.* at 557. Since an allegation of parallel conduct "gets the complaint close to stating a claim," the minimal additional facts necessary to state a claim need only "nudge [the]

claim across the line from conceivable to plausible." *Id.* at 570.

The complaint here alleges facts that bulldoze the claim across the plausibility line creating, in Judge Merritt's view, "an overwhelming case for the plaintiff to get by a motion to dismiss." App. 36a. The complaint not only alleges lock-step parallel commission cuts; it alleges facts that place these parallel moves in a context that suggests conspiracy. For instance, it alleges the specific date and location of meetings where participants voted to jointly reduce commissions immediately before the Airlines simultaneously cut commissions. Based on facts from the industry's history, the complaint alleges that the commission reductions were extraordinary departures from normal business practice, and that the loss of revenue and market share from leading an unmatched commission cut created a risk so great that no rational airline would act without knowing the others would follow along. The complaint alleged that the leader of each cut unnecessarily increased the already substantial risk of business loss by making the cuts effective the day of their announcement, needlessly preventing the leader from waiting to see if others would follow. Each lead cut was followed so closely in time that no rational firm could timely analyze the pros and cons of following. The complaint alleged the craftsmanship of Robert Crandall who, as the CEO of American, matched the 1995 commission reduction within 24 hours, a modus operandi strikingly similar to what he illegally proposed over a

surreptitiously tape-recorded conversation with his competitor just a few years earlier. App. 36a. "Reading these allegations as a whole, the complaint clearly satisfies the *Twombly* standard." App. 38a. But here, surmounting *Twombly*'s requirements was not enough.

The Sixth Circuit began its march toward affirming dismissal by citing this Court's decision in *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 768 (1984) – a summary judgment case – and then adding its own emphasis, the majority quoted the summary judgment standard from that decision:

> The correct standard is that there must be evidence that tends to exclude the possibility of *independent* conduct.

App. 22a (emphasis in majority opinion). The majority also extensively explained *Re/Max Int'l, Inc. v. Realty One, Inc.*, 173 F.3d 995 (6th Cir. 1999), another summary judgment case. Relying on these cases, the Sixth Circuit held that the complaint did not allege facts plausibly suggesting a conspiracy because it failed to exclude the possibility that the Airlines acted independently.[5] App. 25a-26a.

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[5] The dissent correctly summarized the standard employed by the majority:

> [M]y colleagues have seriously misapplied the new standard . . . by requiring the plaintiff to . . . exclud[e] any possibility that the defendants acted independently and not in unison.

(Continued on following page)

The Second Circuit roundly rejected precisely this rule in *Starr v. Sony BMG Music Entm't*, No. 08-5637, 2010 U.S.App.LEXIS 768 (2nd Cir. Jan. 13, 2010), creating a direct circuit conflict. Just as here, *Starr* involved a Section 1 conspiracy complaint that relied on circumstantial evidence, including parallel conduct. But, unlike *Twombly*, the complaint in *Starr* also alleged facts that placed the defendants' parallel conduct in a setting that suggested a preceding agreement, just as here. *Id.* at *20-*23. The *Starr* defendants' principal argument was precisely the Sixth Circuit's holding in this case, that the complaint should be dismissed because it failed to exclude defendants' innocent explanations. The Second Circuit disagreed, holding:

> Defendants first argue that a plaintiff seeking damages under Section 1 of the Sherman Act must allege facts that 'tend[ ] to exclude independent self-interested conduct as an explanation for defendants' parallel behavior.' This is incorrect.

Id. at *24. The Second Circuit correctly observed that the defendants' proposed standard was reserved for summary judgment and was not to be applied on a motion to dismiss. *Id.*

App. 34a. Academic observers have also concluded that this case erroneously applied the summary judgment standard. Lee Goldman, *Trouble for Private Enforcement of the Sherman Act: Twombly, Pleading Standards, and the Oligopoly Problem*, 2008 B.Y.U.L.Rev. 1057, 1090.

The Sixth Circuit majority attempted to justify its reliance on the summary judgment standard on the ground that "it illuminates the plausibility of defendants' lawful, unchoreographed free-market behavior." App. 23a, n. 7. And in fact, rather than analyze the plausibility of the conspiracy inference – as *Twombly* required – here, *the Sixth Circuit analyzed the plausibility of innocent explanations proffered by the Airlines in their briefings*. App. 25a-26a. Finding these explanations "especially plausible," the majority asserted that each Airline's decision to match a commission cut was "*arguably* a reasoned, prudent business decision." App. 30a (emphasis added). Relying on these explanations, the majority found that "defendants have offered a reasonable, alternative explanation for their parallel pricing behavior." App. 26a. Then, citing *Iqbal*, the Court of Appeals held:

> We therefore hold that plaintiffs have failed to allege sufficient facts plausibly suggesting an agreement in violation of § 1 of the Sherman Act because defendants' conduct "was . . . more likely explained by lawful, unchoreographed free-market behavior."

App. 26a (quoting *Iqbal*, 129 S.Ct. at 1950).

Although the majority's holding relied on the quoted portion of a sentence from *Iqbal*, it misquoted the relevant part, fundamentally altering its meaning. The quoted passage from *Iqbal* used the "more likely explained by" language only in reference to "*parallel* conduct," not *all* of "defendants' conduct." It reads in full:

> Acknowledging that *parallel conduct* was consistent with an unlawful agreement, the [*Twombly*] Court nevertheless concluded that it did not plausibly suggest an illicit accord because it was not only compatible with, but indeed was more likely explained by, lawful, unchoreographed free-market behavior.

Iqbal, 129 S.Ct. at 1950 (emphasis added). *Iqbal* was not laying down a new rule; it was simply explaining what the Court observed in *Twombly*: that parallel conduct, *without more*, is ambiguous evidence:

> The inadequacy of showing parallel conduct or interdependence, *without more*, mirrors the ambiguity of the behavior: consistent with conspiracy, but just as much in line with a wide swath of rational and competitive business strategy unilaterally prompted by common perceptions of the market.

Twombly, 550 U.S. at 554 (emphasis added).

This Court never intended these passages to be read as a license for lower courts to apply the summary judgment standard at the motion to dismiss stage, as the foremost antitrust commentators have explained:

> In order to avoid a motion to dismiss, a plaintiff's allegations must "plausibly suggest[ ]" conspiracy. By contrast, in order to avoid summary judgment, the evidence must "tend to rule out the possibility that the defendants were acting independently." Observe that the Supreme Court [in *Twombly*]

> did *not* hold that the same standard applies to a complaint and a discovery record. . . . The 'plausibly suggesting' threshold for a conspiracy complaint remains considerably less than the 'tends to rule out the possibility' standard for summary judgment.

2 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 307d1 (3d ed. 2007) (emphasis in original).

The Sixth Circuit's new rule has interpreted *Twombly* in precisely the wrong way, creating a direct conflict with the law of this Court. By demanding the complaint to show the conspiracy "was more likely explained by" illegal conduct as opposed to independent conduct, it required a showing of probability, which *Twombly* specifically denounced. *Twombly*, 550 U.S. at 556 ("[a]sking for plausible grounds to infer an agreement does not impose a probability requirement at the pleading stage . . . "). By requiring the complaint to exclude Airlines' explanations of the alleged illegal conduct, it held the complaint to a heightened pleading standard, which *Twombly* also specifically forbade. *Id.* at 569, n. 14 ("we do not apply any 'heightened' pleading standard. . . ."); *Erickson v. Pardus*, 551 U.S. 89, 93 (2007) (quoting *Twombly*, 550 U.S. at 555 ("the statement need only 'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.'")).

Other decisions from the Second and Ninth Circuit, as well as an unpublished opinion from the Third Circuit have correctly limited the "more likely

explained by" language to complaints that have *only* alleged parallel conduct. *In re Elevator Antitrust Litig.*, 502 F.3d 47, 51 (2nd Cir. 2007); *Kendall v. VISA U.S.A., Inc.*, 518 F.3d 1042, 1048 (9th Cir. 2008); *St. Clair v. Citizens Fin. Group*, No. 08-4870, 2009 U.S.App.LEXIS 16465, *7 (3rd Cir. Jul. 23, 2009). And, in a Lanham Act case, the District of Columbia Circuit has held that "*Twombly* was concerned with the plausibility of an inference of conspiracy, not with the plausibility of a claim. A court deciding a motion to dismiss must not make any judgment about the probability of the plaintiff's success." *Aktieselskabet AF 21. November 2001 v. Fame Jeans, Inc.*, 525 F.3d 8, 17 (D.C. Cir. 2008).

As Judge Merritt accurately stated as a result of the majority's new rule, "[t]he uniformity needed for the rule of law and equal justice to prevail is lacking." App. 39a. To re-establish consistency with the lower courts' interpretation of *Twombly* and its application to Section 1 conspiracy complaints, the Court should grant the petition and reverse the decision below.

B. The Sixth Circuit's New Pleading Rule Involves An Important Recurring Issue Of Antitrust Law

There may be no more fundamental issue in civil litigation than the requirements for properly pleading a claim to unlock the doors to discovery and, as such, this case presents a recurring issue of national

importance to both antitrust cases specifically and civil cases generally.

The *Twombly* decision is one of the most discussed – and misunderstood – cases in recent history, having been cited by the courts and commentators more than 20,000 times in its barely three-year history. There have already been almost a dozen appellate decisions applying, interpreting or discussing *Twombly* in an antitrust context.[6] And, there have been many district court opinions misapplying the *Twombly* standard across the country. App. 39a (citing cases). Courts have noted the widespread confusion within the lower courts about how to properly apply *Twombly*. *Aktieselskabet*, 525 F.3d at 15 (noting that "[m]any courts have disagreed about the import of *Twombly*"); *In re Elevator Antitrust Litig.*, 502 F.3d at 50. In fact, profoundly worrisome is the admission the district court in this case made that "although the Supreme Court says Rule 8 still exists, I think there is a contradiction in the case. . . ." III Jt.App. 778. The clarity of pleading rules is not a backwater issue. Congress has introduced two bills to clarify the post-*Twombly* pleading rules. Notice Pleading Restoration

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[6] In addition to those cited above, see e.g. *Tunica Web Advertising v. Tunica Casino Operators Assoc., Inc.*, 496 F.3d 403, 409 (5th Cir. 2007); *Cosmetic Gallery, Inc. v. Schoeneman Corp.*, 495 F.3d 46, 54 (3rd Cir. 2007); *Sheridan v. Marathon Petroleum Co.*, 530 F.3d 590, 595 (7th Cir. 2008); *Golden Bridge Tech. Inc. v. Motorola Inc.*, 547 F.3d 266, 271 (5th Cir. 2008).

Act of 2009, S. 1504, 111th Cong. (2009); Open Access to Courts Act of 2009, H.R. 4115, 111th Cong. (2009).

Significant risks attend a misunderstood conspiracy pleading standard. While *Twombly* has certainly had its intended effect of limiting antitrust discovery in meritless cases, its reach has been vastly extended into the termination of perfectly plausible complaints, like the one here. Concern about false positives in cases brought by overly-litigious plaintiffs is one thing, but the misapplication of a pleading rule that thwarts Congressional intent is quite another. The Sherman Act has been called "the Magna Carta of free enterprise," *United States v. Topco Assoc., Inc.*, 405 U.S. 596, 610 (1972), and its goals are no less lofty than the protection and preservation of our national democracy, society and economy. *Northern Pac. Ry. Co. v. United States*, 356 U.S. 1, 4 (1958). Yet, the Sixth Circuit's new rule effectively eliminates conspiracy cases brought on circumstantial evidence. It "proposes to require either an express written agreement among competitors or a transcribed oral agreement to fix prices; [n]othing less will do." App. 42a. But if plaintiffs are prohibited from relying on circumstantial evidence to prove an agreement, "conspiracies would flourish; profit, rather than punishment, would be the reward." *C-O-Two Fire Equip. Co. v. United States*, 197 F.2d 489, 494 (9th Cir. 1952), *cert. denied*, 344 U.S. 892 (1952). Antitrust's goals are compromised each time a properly-pled conspiracy complaint is prematurely dismissed, which has been frequent enough without the Sixth Circuit's new stringent requirements. App. 39a ("district court

judges across the country have dismissed a large majority of Sherman Act claims on the pleadings misinterpreting the standards from *Twombly* and *Iqbal*. . . ."). Misapplication of the law is particularly harmful if wielded by lower courts to circumvent the will of Congress. App. 42a. In his dissent, Judge Merritt best described the need for review when he urged this Court "to make it clear that *Twombly* may not be used, as my colleagues propose, as a cover for repealing regulation of the marketplace through private antitrust enforcement." App. 42a.

In short, this case presents an ideal vehicle to clarify the plausibility standard and more concretely define its outer boundaries. The Court should grant review and act decisively to reverse the Sixth Circuit's wayward interpretation of the plausibility standard.

II. Review Is Independently Warranted To Resolve A Conflict Created By The Sixth Circuit's Decision With Decisions Of The Fourth And Eighth Circuits And With Decisions Of This Court Regarding The Proper Pleading Of "Overt Acts" In The Continuing Conspiracy Doctrine

The Sixth Circuit's decision presents a second issue independently worthy of review involving the pleading of the continuing conspiracy doctrine in a bankruptcy setting. In conflict with decisions from Fourth and Eighth Circuits, the Sixth Circuit held that the defendants did not commit overt acts, as a

matter of law, when they repeatedly purchased Travel Agents' services at prices set by the conspiracy (App. 11a), reasoning that each purchase was "merely the reaffirmation of a previous act." App. 10a.

The complaint alleges that after the Airlines' conspiracy was implemented, major players involved in its creation entered into bankruptcy.[7] Compl. ¶¶ 109-116; App. 117a-118a. But, by continuing to purchase services at the conspiracy price post-bankruptcy, these airlines committed acts that arose post-discharge and are liable for the resulting damages. Specifically, the complaint alleges that "upon emerging from bankruptcy" (Compl. ¶ 117; App. 118a), these Airlines, "through their conduct," "conform[ed] to the commission levels and caps to which their co-conspirators had agreed" (Compl. ¶ 118; App. 118a), resulting in a "continuing offense" to violate the antitrust laws. Compl. ¶ 109; App. 117a. In effect, the conspiracy "straddled" the bankruptcy period, and by continuing to purchase Travel Agent services at the conspiracy rate, the Airlines committed overt acts resulting in new post-discharge causes of action.

"In the context of a continuing conspiracy to violate the antitrust laws . . . each time a plaintiff is injured by an act of the defendants a cause of action accrues to him to recover the damages caused by that act." *Zenith Radio Corp. v. Hazeltine Research, Inc.*,

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[7] The complaint alleges that seven separate airlines filed for bankruptcy. The only one relevant on this appeal is United.

401 U.S. 321, 338 (1971). In a continuing price-fixing conspiracy, it is not the agreement itself or the implementation of the conspiratorial price, but the *purchase* of the product at the fixed rate that makes up the last overt act establishing a new cause of action. In *Klehr v. A.O. Smith Corp.*, 521 U.S. 179 (1997), this Court explained:

> Antitrust law provides that, in the case of a "continuing violation," say a price fixing conspiracy that brings about a series of unlawfully high priced sales over a period of years, "each overt act that is part of the violation and that injures the plaintiff," *e.g.*, *each sale to the plaintiff*, "starts the statutory period running again. . . ."

Id. at 189 (quoting 2 AREEDA & HOVENKAMP, ¶ 338b, p. 145 (rev. ed. 1995)) (emphasis added). "A conspiracy thus continued is in effect renewed during each day of its existence." *United States v. Borden Co.*, 308 U.S. 188, 202 (1939).

The Sixth Circuit recognized the validity of the continuing conspiracy doctrine (App. 10a), and acknowledged that a new cause of action arises with the commission of each overt act. App. 11a. However, it held that when the Airlines' continued to purchase Travel Agents' services at the conspiracy rate, they did not commit overt acts. App. 10a-11a.

This holding conflicts with the Eleventh Circuit's decision in *Morton's Market, Inc. v. Gustafson's Dairy,*

Inc., 198 F.3d 823 (11th Cir. 1999), a Section 1 price-fixing conspiracy case with facts similar to those here. *Morton's Market* involved a twenty-year conspiracy beginning in the 1970s among the large dairy producers in Florida to fix the prices of milk sold to public schools. *Id.* at 826. The last meeting among the defendants to set prices occurred in 1987. However, sales of the milk at the fixed price continued until 1992. Plaintiffs filed their complaint in 1993. The dairies moved for summary judgment on the ground the action was time-barred by the four-year statute of limitations, arguing the last overt act was the setting of the fixed price in 1987. The Eleventh Circuit rejected Dairies' argument and reversed the district court's decision. Quoting the *Klehr* passage above, the Court of Appeals correctly stated that the last overt act was plaintiff's purchase of the milk at the fixed price:

> [W]hen sellers conspire to fix the price of a product, each time a customer purchases that product at the artificially high price, an antitrust violation occurs and a cause of action accrues.

Id. at 828. "Even if there were no price-fixing conversations after 1987," the Court explained, "if plaintiffs purchased milk at a fixed price after that date, *the purchase would constitute an overt act that injured it*." *Id.* (emphasis added).

The Fourth Circuit's decision in *In re: Cotton Yarn Antitrust Litig.*, 505 F.3d 274 (4th Cir. 2007) also conflicts with the holding below. There, the Fourth

Circuit upheld the sufficiency of an overt act allegation in a complaint pleading a continuing conspiracy in violation of Section 1, as here. The Court of Appeals held that "[u]nder *Klehr*," the defendants have committed an overt act "so long as the plaintiffs made a purchase from the Defendants." *Id.* at 290-291. Thus, the statute of limitations did not begin running when the defendants *decided* to fix prices or *implemented* the fixed price; rather, each transaction at the fixed price constituted an overt act and a new claim accrued. *Id.*

It makes no difference whether the overt act is the *sale* of a price-fixed product or, as here, the *purchase* of a price-fixed service. The law does not distinguish between price-fixing conspiracies among sellers or among buyers, *Mandeville Island Farms v. American Crystal Sugar Co.*, 334 U.S. 219, 253 (1948), because "price fixing by buyers raises the same issues and poses the same dangers as price fixing by sellers." 12 AREEDA & HOVENKAMP, ¶ 2010, p. 123 (3d ed. 2007). Neither does the law contemplate a distinction between conspiracies to fix prices of *products* or *services*. "[T]he law against buying and selling cartels covers services as well as goods." *Id.* at 125. Therefore, since the sale of a price-fixed product constitutes an overt act, the purchase or acquisition of a service constitutes an overt act.

The Airlines' conspiracy to *completely* eliminate the commission, as opposed to continuing to pay some commission, may also have tainted the Sixth Circuit's analysis and distracted it from applying the law. But,

for purposes of pleading an overt act, the law cannot distinguish between a commission cut to 0% or to some positive rate, like 1%, under the mistaken reasoning that the latter involves the payment of some money (an act); whereas, the former does not. If that were the law, and the Sixth Circuit's rule is susceptible to that reading, defendants would have the perverse incentive to harm plaintiffs maximally in order to escape liability completely. Moreover, while the Sixth Circuit described the alleged overt act as "United's *decision* to maintain its 0% commission policy," that decision in fact required affirmative action on United's part, including the delivery of the booked ticket, the acceptance of money in return for the ticket, and the refusal to pay the Travel Agent who booked the ticket.

Finally, the Sixth Circuit's decision contains a fundamental inconsistency. The Court of Appeals distinguished *Klehr* on the grounds that it "did not involve a formerly bankrupt corporation." App. 10a. Therefore, the Airlines' conduct could not "qualif[y] as a continuing violation." *Id.* The Sixth Circuit thus determined that the continuing violation doctrine does not apply to a claim surviving through a temporary bankruptcy period. On the other hand, the Sixth Circuit also cited with approval the Ninth Circuit's decision in *O'Loghlin v. County of Orange*, 229 F.3d 871, 875 (9th Cir. 2000) for the proposition that "a successfully reorganized debtor . . . is liable for any independent conduct that arises after the confirmation of its bankruptcy plan." App. 10a.

O'Loghlin specifically applied the continuing violation doctrine to a violation that straddled the bankruptcy period, as here. It held that a post-bankruptcy violation is not discharged if it is a "continuation of the [defendant's] illegal pre-discharge behavior." *O'Loghlin*, 229 F.3d at 873. In doing so, it stated that "an important purpose of the continuing violation doctrine is to prevent a defendant from using its earlier illegal conduct to avoid liability for later illegal conduct of the same sort." *Id.* The Ninth Circuit concluded:

> The district court's holding would allow a defendant to use pre-discharge violations . . . to insulate itself from liability for post-discharge violations, so long as the pre- and post-discharge violations were part of the same course of conduct. . . . The bankruptcy laws provide no justification for such a result. Their purpose is to provide a "fresh start" to a discharged debtor. . . . A "fresh start" means only that; it does not mean a continuing license to violate the law.

Id. If in distinguishing *Klehr* on the ground it did not involve bankruptcy, the Sixth Circuit refused to apply the continuing conspiracy doctrine to facts that straddle a bankruptcy proceeding, it directly conflicts with the Ninth Circuit's decision in *O'Loghlin*. If, on the other hand, it concedes the proper application of the continuing conspiracy doctrine in this case, it conflicts with the decisions defining an "overt act," set forth above.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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March, 2010

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583 F.3d 896

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

In re: TRAVEL AGENT COMMISSION ANTITRUST LITIGATION.

TAM TRAVEL, INC., et al.,
Plaintiffs-Appellants,

v.

DELTA AIRLINES, INC., et al.,
Defendants-Appellees.

No. 07-4464

Appeal from the United States District Court
for the Northern District of Ohio at Cleveland.
No. 03-30000 – Peter C. Economus, District Judge

Argued: October 24, 2008

Decided and Filed: October 2, 2009

Before: MERRITT, BOGGS, and GRIFFIN, Circuit Judges.

COUNSEL

ARGUED: Joseph M. Alioto, Jr., Thomas Paul Pier, ALIOTO LAW FIRM, San Francisco, California, for Appellants. Peter K. Huston, LATHAM & WATKINS,

San Francisco, California, James A. Reeder, Jr., VINSON & ELKINS L.L.P., Houston, Texas, Lee H. Simowitz, BAKER & HOSTETLER, Washington, D.C., for Appellees. **ON BRIEF:** Joseph M. Alioto, Jr., Thomas Paul Pier, Joseph Alioto, Sr., ALIOTO LAW FIRM, San Francisco, California, for Appellants. James A. Reeder, Jr., Lauren J. Harrison, Elizabeth A. Pannill, VINSON & ELKINS L.L.P., Houston, Texas, for Appellees.

GRIFFIN, J., delivered the opinion of the court, in which BOGGS, J., joined. MERRITT, J. (pp. 22-28), delivered a separate dissenting opinion.

OPINION

GRIFFIN, Circuit Judge. Plaintiff travel agencies appeal the district court's dismissal of their Amended Complaint for failure to state a claim under § 1 of the Sherman Antitrust Act. Plaintiffs allege that defendants conspired to reduce, cap, and eventually eliminate the payment of base commissions in a concerted effort to drive plaintiffs out of business in violation of 15 U.S.C. § 1. We affirm. In doing so, we hold that plaintiffs' claims against United Airlines were discharged in bankruptcy and that plaintiffs' claims against the remaining defendants failed to allege sufficient facts to plausibly suggest a prior illegal agreement.

I.

A.

Plaintiffs are the owners of forty-nine travel agencies engaged in the business of selling defendants' airline services.[1] When a plaintiff sold an airline ticket before 2002, it received a sales commission from the servicing airline that equaled a percentage of the purchased ticket price. This practice, commonly referred to as the payment of "base commissions," was industry-wide.

Plaintiffs allege a § 1 conspiracy based on a series of uniform base commission cuts adopted by defendants over a seven-year period. According to plaintiffs, each defendant's decision to match its competitors' base commission cut was the product of defendants' prior illegal agreement to eliminate the practice of paying all base commissions – a result achieved in March 2002.

Plaintiffs assert the conspiracy began in 1995, when Delta, American, Northwest, United, and Continental each announced a $25 cap on base commissions for one-way domestic tickets and a $50 cap for

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[1] The following airlines were named as defendants in plaintiffs' Amended Complaint: Air Canada, Alaska Airlines, Inc. ("Alaska"), Alaska Air Group, Inc. ("AAG"), ATA Airlines, Inc., American Airlines, Inc., America West Airlines, Inc., Continental Airlines Inc., Delta Air Lines, Inc., Hawaiian Airlines, Inc., Horizon Air Industries, Inc., Frontier Airlines, Inc., KLM Royal Dutch Airlines, Northwest Airlines, Inc., United Airlines, Inc., US Airways, Inc., and U.S. Airways Group, Inc.

round-trip domestic tickets. Plaintiffs further contend that United's decision to cut its base commission rate on September 18, 1997, from 10% of the purchased ticket price to 8% is further evidence of the alleged illegal agreement because American, Delta, Northwest, US Airways, Continental, and America West each matched United's commission cut on or before September 29, 1997. On March 31, 1998, Frontier Airlines announced that it, too, would reduce its base commission rate from 10% to 8%, as did Alaska Airlines on September 30, 1997.

Plaintiffs allege that defendants' conspiracy continued into mid-November 1998, when United imposed base commission caps of $50 and $100 for one-way and round-trip international airfare, respectively. By December 2, 1998, American, Delta, Continental, Northwest, and US Airways each adopted United's $50 and $100 base commission caps.

Almost one year later, on October 7, 1999, United instituted its third commission cut, reducing its base commission rate from 8% to 5% on all domestic and international flights. American, Delta, Northwest, Continental, and US Airways each adopted United's 5% commission cut by the following week. America West and Alaska each matched United's 5% commission cut on October 18, 1999, as did Frontier in November 1999.

On August 17, 2001, American implemented base commission caps of $10 for one-way tickets and $20 for round-trip tickets, effective the following day.

Within ten days, United, Delta, Northwest, Continental, US Airways, and America West each adopted American's $10 and $20 caps. Frontier and Alaska followed suit on September 4, 2001, and November 1, 2001, respectively.

Finally, on March 14, 2002, Delta announced that it would eliminate its practice of paying base commissions to travel agencies for both domestic and international airfare, effective immediately. Within ten days, American, United, Northwest, Continental, US Airways, and America West likewise eliminated the payment of base commissions. Frontier and Alaska followed suit in late May 2002.

Plaintiffs allege that each defendant's decision to cut, cap, and eventually eliminate its practice of paying travel agencies a base commission would not have occurred without collusion because such action, if taken independently, was contrary to the individual defendant's economic self-interest. Plaintiffs point to United's unsuccessful attempt to cut base commission rates in 1981 and American's similar failed attempt in 1983 as evidence of collusion in the present case. In addition, plaintiffs' Amended Complaint refers to the deposition of a former American Airlines executive, Michael Gunn, who testified that "industry consensus" was necessary for industry-wide commission cuts to hold. Gunn also testified that "he had to match commission cuts exactly or he would undercut the movement." Plaintiffs assert that Gunn's statements are persuasive evidence of defendants' common motive to conspire.

As additional support for the alleged conspiracy, plaintiffs point to several meetings where defendants had an opportunity to conspire, including committee meetings of the International Air Transport Association in 1997 and 1998, as well as industry meetings such as the "Conquistadores Del Cielo" (Conquerors of the Sky), the Air Transport Association, the Japan Air Summit, the British Air Summit, the Paris Air Show, the Alex Brown Transportation Conference, the International Aviation Symposium, and the Merrill Lynch conference. Plaintiffs do not identify defendants' attendees by name or title.

More specifically, the Amended Complaint asserts that "in mid-1999 an Executive Vice-President of Marketing & Distribution for Northwest Airlines, a Senior Vice President of Planning for US Airways, and a Senior Vice President of Marketing for American met for three hours in a Dallas hotel conference room." Plaintiffs further allege that "[i]n 2001, a Delta senior executive met for a weekend of golf and socializing at the home of an American executive responsible for setting American's commission levels."

By May 31, 2002, each defendant had eliminated its practice of paying travel agencies a base commission. In addition, several defendants filed for and have emerged from Chapter 11 bankruptcy, including Delta, Northwest, and United.[2]

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[2] For the purposes of this appeal, only United's bankruptcy is relevant. United filed its Chapter 11 bankruptcy petition on

(Continued on following page)

B.

On April 9, 2003, plaintiff Tam Travel, Inc. and forty-eight other travel agencies filed a complaint against defendants for illegally agreeing to cap, cut, and eliminate base commissions in violation of § 1 of the Sherman Antitrust Act. 15 U.S.C. § 1.[3] On September 13, 2007, plaintiffs had dismissed defendants US Airways and US Airways Group from the suit without prejudice. On September 14, 2007, the district court determined that the Supreme Court's decision in *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544 (2007), could impact the present case and allowed plaintiffs to file an Amended Complaint. On September 28, 2007, several defendants filed a joint motion to dismiss the Amended Complaint under FED. R. CIV. P. 12(b)(6).

On October 29, 2007, the district court granted defendants' motion to dismiss, ruling that: (1) plaintiffs failed to allege any conduct other than sporadic parallel conduct regarding America West, Alaska, Frontier, and Horizon; (2) plaintiffs failed to allege any parallel conduct as to KLM; (3) the emergence of Northwest, United, and Delta from bankruptcy discharged plaintiffs' claims; (4) with regard to Continental and United, plaintiffs failed to aver sufficient

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December 9, 2002, and the bankruptcy court confirmed its reorganization plan on January 20, 2006.

[3] Plaintiffs opted out of the putative class in *Hall v. United Air Lines, Inc.*, 296 F. Supp. 2d 652 (E.D.N.C. 2003).

facts to plausibly suggest an illegal agreement under *Twombly*;[4] and (5) with regard to AAG, a holding company that does not itself pay commissions, plaintiffs failed to allege any facts.

Plaintiffs filed a timely motion for reconsideration, which the district court denied on March 13, 2008. This appeal followed.[5]

II.

Plaintiffs first contend that the district court erred when it ruled that their § 1 claims against United were discharged by the bankruptcy court. By operation of the Bankruptcy Code, confirmation of a reorganization plan "discharges the debtor from any debt that arose before the date of . . . confirmation." 11 U.S.C. § 1141(d). Section 101(12) of the Bankruptcy

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[4] The district court unintentionally omitted American from its identification of "remaining Defendant airlines" for the purposes of this holding. It is clear from the substance of the opinion however, that the district court did not intend to suggest that claims against American were any more meritorious than against Continental and United.

[5] After the parties filed their appellate briefs, we were notified that Frontier and ATA filed for Chapter 11 bankruptcy under 11 U.S.C. § 362(a)(1). The filing of a bankruptcy petition operates as an automatic stay of the continuation of a judicial action against the debtor. *Spirit Airlines, Inc. v. Northwest Airlines, Inc.*, 431 F.3d 917, 921 n.1 (6th Cir. 2005) (automatic stay under § 362(a)(1) applies to appellate proceedings). Following oral argument, we also accepted the stipulated dismissal of defendants Delta, Northwest, and KLM.

Code defines a "debt" as "liability on a claim." Pursuant to 11 U.S.C. § 101(5), a "claim" includes a "right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, [or] unmatured."

The district court ruled that because United filed for bankruptcy in December 2002 and its reorganization plan was not confirmed until January 2006, United's emergence from bankruptcy discharged any liability on claims that arose before its reorganization. Because plaintiffs alleged that United made its last commission cut in March 2002, the district court dismissed plaintiffs' claims against United as discharged debt under 11 U.S.C. § 101(5).

As a preliminary matter, plaintiffs' brief does not challenge the district court's decision to dismiss United under 11 U.S.C. § 101(5), other than to mention in a single sentence that "[e]ach of these airlines emerged from bankruptcy before Travel Agents filed their complaint." Moreover, the record and the Amended Complaint refute this assertion. Because plaintiffs present only a perfunctory argument regarding United's dismissal under 11 U.S.C. § 101(5), plaintiffs have waived this argument. *See United States v. Phinazee*, 515 F.3d 511, 520 (6th Cir. 2008) (issues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived). In any event, we find no error in the district court's ruling that United's potential liability qualified as discharged debt under 11 U.S.C. § 101(12).

Plaintiffs assert that United is nonetheless liable under a continuing violation theory because United allegedly rejoined the conspiracy after emerging from bankruptcy in 2006. Specifically, plaintiffs contend that United's decision to "continue" the "conspiracy commission rate" (which, at this point, was 0%) after its reorganization created a new § 1 claim under the Sherman Act.

As a general rule, a successfully reorganized debtor under Chapter 11 of the Bankruptcy Code is liable for any independent conduct that arises after the confirmation of its bankruptcy plan. *In re WorldCom, Inc.*, 546 F.3d 211, 221 (2d Cir. 2008); *O'Loghlin v. County of Orange*, 229 F.3d 871, 875 (9th Cir. 2000). In short, the debtor gets a fresh start, but that "does not [provide] a continuing license to violate the law." *Id.* In the present case, the district court concluded that United's post-reorganization 0% commission policy did not create a new § 1 claim because its decision was "merely a reaffirmation of a previous act."

Plaintiffs rely on *Klehr v. A.O. Smith Corp.*, 521 U.S. 179 (1997), to argue that United's conduct qualifies as a continuing violation. The *Klehr* case, however, did not involve a formerly bankrupt corporation. *Id.* at 186. *Klehr* simply reiterates that the antitrust laws recognize continuing violations and, more precisely, that a new § 1 claim arises each time a company sells a price-fixed product. *Id.* at 188.

We have held that an "antitrust cause of action accrues . . . each time a defendant commits an act that injures the plaintiff's business." *DXS, Inc. v. Siemens Med. Sys., Inc.*, 100 F.3d 462, 467 (6th Cir. 1996) (citing *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 338 (1971)). "[T]he focus is on the timing of the causes of injury, i.e., the defendant's overt acts, as opposed to the *effects* of the overt acts." *Peck v. Gen. Motors Corp.*, 894 F.2d 844, 849 (6th Cir. 1990) (per curiam) (emphasis added). "[T]he fact that [] injuries have a rippling effect into the future only establishes that [plaintiffs] might have been entitled to future damages. . . ." *Id.*

Here, we reject plaintiffs' attempt to characterize United's decision to maintain its 0% commission policy as an overt act. "Since the Supreme Court decided *Zenith*, federal courts have uniformly defined a continuing antitrust violation as one in which the plaintiff's interests are repeatedly invaded." *Peck*, 894 F.2d at 849 (quoting *Pace Indus., Inc. v. Three Phoenix Co.*, 813 F.2d 234, 237 (9th Cir. 1987) (internal quotation marks and alterations omitted)). Although United's participation in the alleged conspiracy would certainly create a rippling effect, plaintiffs assert that United's final act to effectuate that conspiracy occurred in 2002, long before United emerged from bankruptcy. We also cannot ignore the consequence of concluding that an overt act occurred under these facts. If we were to adopt plaintiffs' continuing violation theory, the applicable limitations period for a § 1 claim would be infinite – an antitrust

plaintiff could routinely salvage an otherwise untimely claim by asserting that it continues to lose revenue because of past alleged anticompetitive conduct. We therefore hold that the district court properly dismissed plaintiffs' claims against United.

III.

We review de novo the district court's dismissal of plaintiffs' Amended Complaint under FED. R. CIV. P. 12(b)(6). *Johnson v. City of Detroit*, 446 F.3d 614, 618 (6th Cir. 2006). In *Twombly*, the Supreme Court held that a complaint alleging violations under § 1 of the Sherman Act cannot survive a motion to dismiss unless it avers facts that raise a reasonable expectation that discovery will reveal evidence of an illegal agreement. *Twombly*, 550 U.S. at 556. In the wake of *Twombly*, allegations of parallel conduct and bare assertions of conspiracy no longer supply an adequate foundation to support a plausible § 1 claim. *Id.*

Specifically, the complaint's "[f]actual allegations must be enough to raise a right to relief above the speculative level," *id.* at 555, and "state a claim to relief that is plausible on its face." *Id.* at 570. Of course, we must still "construe the complaint in the light most favorable to the plaintiff, accept its allegations as true, and draw all reasonable inferences in favor of the plaintiff." *Jones v. City of Cincinnati*, 521 F.3d 555, 559 (6th Cir. 2008) (internal quotation and citation omitted). "Yet, to survive a motion to dismiss, the complaint must contain either direct or

inferential allegations respecting all material elements to sustain a recovery under some viable legal theory." *Eidson v. State of Tenn. Dep't of Children's Servs.*, 510 F.3d 631, 634 (6th Cir. 2007). "We need not accept as true legal conclusions or unwarranted factual inferences," *Jones*, 521 F.3d at 559 (alteration and internal citation omitted), and "[c]onclusory allegations or legal conclusions masquerading as factual allegations will not suffice." *Eidson*, 510 F.3d at 634 (internal citation omitted).

A.

Allegations of concerted action by competitors are frequently based on a pattern of uniform business conduct, which courts often refer to as "conscious parallelism." Conscious parallelism, however, is not in itself prohibited under § 1 of the Sherman Act. As the Supreme Court explained in *Twombly*:

> Because § 1 of the Sherman Act "does not prohibit [all] unreasonable restraints of trade . . . but only restraints effected by a contract, combination, or conspiracy," *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 775 (1984), "[t]he crucial question" is whether the challenged anticompetitive conduct "stem[s] from independent decision or from an agreement, tacit or express," *Theatre Enters. v. Paramount Film Distrib. Corp.*, 346 U.S. [537, 540 (1954)]. While a showing of parallel "business behavior is admissible circumstantial evidence from which the fact finder may infer agreement," it falls short of

"conclusively establish[ing] agreement or . . . itself constitut[ing] a Sherman Act offense." *Id.* at 540-41. Even "conscious parallelism," a common reaction of "firms in a concentrated market [that] recogniz[e] their shared economic interests and their interdependence with respect to price and output decisions" is "not itself unlawful." *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 227 (1993).

The inadequacy of showing parallel conduct or interdependence, without more, mirrors the ambiguity of the behavior: consistent with conspiracy, but just as much in line with a wide swath of rational and competitive business strategy unilaterally prompted by common perceptions of the market. Accordingly, we have previously hedged against false inferences from identical behavior at a number of points in the trial sequence. An antitrust-conspiracy plaintiff with evidence showing nothing beyond parallel conduct is not entitled to a directed verdict, *see Theatre Enters., supra*; proof of a § 1 conspiracy must include evidence tending to exclude the possibility of independent action, *see Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752 (1984); and at the summary judgment stage a § 1 plaintiff's offer of conspiracy evidence must tend to rule out the possibility that the defendants were acting independently, *see Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

Twombly, 550 U.S. at 554 (some internal citations omitted).

The *Twombly* decision provides an additional safeguard against the risk of "false inferences from identical behavior" at an earlier stage of the trial sequence – the pleading stage. A district court's early assessment of the sufficiency of a § 1 claim under FED. R. CIV. P. 12(b)(6) or FED. R. CIV. P. 12(c) addresses the dilemma of the extensive litigation costs associated with prosecuting and defending antitrust lawsuits. As the *Twombly* Court acknowledged, "the costs of modern federal antitrust litigation and the increasing caseload of the federal courts counsel against sending the parties into discovery when there is no reasonable likelihood that the plaintiffs can construct a claim from the events related in the complaint." *Id.* at 558 (internal citation and quotation marks omitted).

In *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1950 (2009), the Supreme Court explained the *Twombly* decision as follows:

> [In *Twombly*], we considered the sufficiency of a complaint alleging that incumbent telecommunications providers had entered an agreement not to compete and to forestall competitive entry, in violation of the Sherman Act, 15 U.S.C. § 1. Recognizing that § 1 enjoins only anticompetitive conduct "effected by a contract, combination, or conspiracy," *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 775 (1984), the plaintiffs in

Twombly flatly pleaded that the defendants "ha[d] entered into a contract, combination or conspiracy to prevent competitive entry . . . and ha[d] agreed not to compete with one another." 550 U.S. at 551 (internal quotation marks omitted). The complaint also alleged that the defendants' "parallel course of conduct . . . to prevent competition" and inflate prices was indicative of the unlawful agreement alleged. *Ibid.* (internal quotation marks omitted).

The Court held the plaintiffs' complaint deficient under Rule 8. In doing so [,] it first noted that the plaintiffs' assertion of an unlawful agreement was a "'legal conclusion'" and, as such, was not entitled to the assumption of truth. *Id.*, at 555. Had the Court simply credited the allegation of a conspiracy, the plaintiffs would have stated a claim for relief and been entitled to proceed perforce. The Court next addressed the "nub" of the plaintiffs' complaint – the well-pleaded, nonconclusory factual allegation of parallel behavior – to determine whether it gave rise to a "plausible suggestion of conspiracy." *Id.*, at 565-566. *Acknowledging that parallel conduct was consistent with an unlawful agreement, the Court nevertheless concluded that it did not plausibly suggest an illicit accord because it was not only compatible with, but indeed was more likely explained by, lawful, unchoreographed free-market behavior. Id.* at 567. Because the well-pleaded fact of parallel conduct, accepted as true, did not plausibly suggest an unlawful agreement,

> the Court held the plaintiffs' complaint must be dismissed. *Id.*, at 570.

Id. (emphasis added).

B.

Plaintiffs first argue that *Twombly* is distinguishable because their Amended Complaint "makes independent allegations of actual agreement." Plaintiffs contend that ¶¶ 90, 91, and 121 independently allege an illegal agreement. In ¶ 121, plaintiffs use the word "agreement," asserting that "the conduct of Defendants described hereinabove, and . . . the *agreement* between and among Defendants to reduce, cap and eliminate commissions paid to plaintiffs" violates the Sherman Act. (Emphasis added.) This averment is nothing more than a legal conclusion "masquerading" as a factual allegation. *See Eidson*, 510 F.3d at 634. The Supreme Court rejected a similar argument in *Twombly*, holding that "a few stray statements speak[ing] directly of agreement . . . are merely legal conclusions resting on [ ] prior allegations." *Twombly*, 550 U.S. at 564.

Paragraphs 90 and 91 of the Amended Complaint assert that defendants' executives, who were "responsible for [ ] setting [ ] commission levels . . . met frequently during the period of cuts and caps," which "afforded these persons the opportunity to . . . conspire" and "communicate[ ] with one another for the purpose of . . . implementing . . . their common plan. . . ." These allegations, however, aver only an

opportunity to conspire, which does not necessarily support an inference of illegal agreement. In fact, ¶¶ 90 and 91 are located in a section of the Amended Complaint entitled "Opportunities for Defendants to Combine and Conspire." We conclude that plaintiffs' attempt to distinguish *Twombly* on the basis that plaintiffs allege "actual agreement" fails.

C.

Next, plaintiffs argue that the district court erred when it dismissed their § 1 claim against Alaska, AAG, Horizon, and America West because the Amended Complaint contained more than bare assertions of conspiracy and parallel conduct. We disagree.

In each of the four references to Alaska in the Amended Complaint, plaintiffs allege only that Alaska adopted uniform commission cuts in 1997, 1999, 2000, and 2001. The Amended Complaint does not contain any factual allegations to support Alaska's involvement in the conspiracy, beyond its parallel behavior. America West is also referred to four times but, like Alaska, plaintiffs allege parallel conduct alone and fail to aver facts sufficient to implicate America West in any conspiracy.

AAG and Horizon are also named defendants and parties to this appeal, but neither is mentioned in the body of the Amended Complaint, nor do plaintiffs specify how these defendants are involved in the alleged conspiracy. Consequently, if these "defendant[s] [sought] to respond to plaintiffs' [ ] allegations

in the § 1 context, [they] would have little idea where to begin." *Twombly*, 550 U.S. at 564 n.10.

Plaintiffs attempt to implicate these defendants in the purported conspiracy by relying on several vague allegations contained in the Amended Complaint that refer to "defendants" or "defendants' executives." However, plaintiffs' reliance on these indeterminate assertions is misplaced because they represent precisely the type of naked conspiratorial allegations rejected by the Supreme Court in *Twombly*. *See Twombly*, 550 U.S. at 565 n.10 (stating that where "complaint [] furnishes no clue" as to which defendants supposedly agreed or when and where the illicit agreement took place, the complaint fails to give adequate notice as required by Fed. R. Civ. P. 8). "A statement of parallel conduct, even conduct consciously undertaken, needs some setting suggesting the agreement necessary to make out a § 1 claim; without that further circumstance pointing toward a meeting of the minds, an account of a defendant's commercial efforts stays in neutral territory." *Id.* at 557. For these reasons, we hold that the district court properly dismissed plaintiffs' § 1 claim against Alaska, AAG, Horizon, and America West. Thus, only defendants Continental and American remain.

D.

Finally, plaintiffs argue that factual allegations in their Amended Complaint raise a reasonable expectation that discovery will reveal circumstantial

evidence sufficient to suggest an antitrust conspiracy similar to that present in *Interstate Circuit v. United States*, 306 U.S. 208 (1939). In this regard, plaintiffs' Amended Complaint alleges that:

> Each Defendant knew that concerted action to reduce and cap commissions was contemplated and invited. Each Defendant adhered to the common scheme to reduce and cap commissions and participated in it. Each Defendant was advised that every other Defendant was invited to participate. Each Defendant knew that cooperation was essential to successful operation of the plan.

In *Interstate Circuit*, the Supreme Court held that a pattern of uniform admission ticket prices at subsequent-run theaters was sufficient to permit a fact-finder to infer the existence of an illegal agreement.[6] Plaintiffs focus on the following language of *Interstate Circuit*:

> Each was aware that all were in active competition and that without substantially

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[6] We recognize that *Interstate Circuit* was decided at a more advanced stage of the legal process, and we do not suggest that the same standards ought to be applied on a motion to dismiss, even under *Twombly*. However, plaintiffs argue that they have alleged enough factual matter "to raise a reasonable expectation that discovery will reveal" circumstantial "evidence of illegal agreement," *Twombly*, 550 U.S. at 556, analogous to the circumstantial evidence discovered in *Interstate Circuit*. Thus, we examine plaintiffs' complaint with an eye to any factual allegations that would make it "reasonable" to "expect [ ]" that similar circumstantial evidence would surface during discovery. *Id.*

> unanimous action with respect to the restrictions for any given territory there was risk of a substantial loss of the business and good will of the subsequent-run and independent exhibitors, but that with it there was the prospect of increased profits.

306 U.S. at 222.

However, plaintiffs fail to acknowledge the salient evidence of unlawful collusion presented in *Interstate Circuit*. Specifically, in *Interstate Circuit*, a Texas movie theater chain sent an identical letter to eight major movie distributors threatening to discontinue showing their films if the distributors did not require all subsequent-run theaters to charge a minimum admission price of twenty-five cents. *Id.* at 216-17. The admission price customarily charged in independently operated subsequent-run theaters in Texas at that time was less than twenty-five cents. *Id.* at 217. Soon thereafter, each distributor required all subsequent-run theaters showing their films to charge a minimum of twenty-five cents.

The Supreme Court concluded that Interstate Circuit's letter, which listed all eight distributors as addressees, provided uncontested evidence that each distributor knew about the involvement of the others and constituted persuasive evidence of a conspiracy, particularly because the defendants could offer no alternative reason for their parallel pricing demands. *Id.*

Plaintiffs point to the Airline Reporting Corporation ("ARC"), which is an information clearinghouse for airlines. The ARC provides information on ticket distribution, reporting and settlement services, and base commission rates paid to travel agents. However, there is no allegation in the Amended Complaint that ARC could provide defendants with commission reduction information *before* defendants implemented their rate reductions. According to the Amended Complaint, every leader airline (the first to announce and implement a commission cut) publicly announced its cut and implemented the change almost immediately. Thus, defendants' access to ARC does not suggest a viable means to collude on commission rates before such reductions occurred.

In *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 768 (1984) (emphasis added), the Supreme Court established the modern standard to evaluate evidence bearing on concerted action:

> The correct standard is that there must be evidence that tends to exclude the possibility of *independent* action. . . . That is, there must be direct or circumstantial evidence that reasonably tends to prove that the [defendant] and others had a conscious commitment to a common scheme designed to achieve an unlawful objective.

We applied this standard in *Re/Max Int'l, Inc. v. Realty One, Inc.*, 173 F.3d 995 (6th Cir. 1999), wherein the plaintiff, a national real estate brokerage franchiser, sued two local real estate firms, alleging a

violation of § 1 of the Sherman Act.[7] Under the local firms' adverse-splits policy, whenever Re/Max agents were involved in a transaction, defendants paid them only 25 or 30 percent of the commission, rather than the industry norm of a 50/50 split. Re/Max alleged that the adverse-splits policy, the means by which defendants controlled the market for hiring real estate agents, violated § 1. 173 F.3d at 1010. Re/Max claimed that the adverse-splits policy lowered its sales revenue and prevented it from recruiting knowledgeable and experienced sales agents because both defendants adopted a policy that paid its agents less than the industry norm. *Id.*

We reversed the district court's grant of summary judgment in favor of the defendants, holding that the plaintiff provided sufficient circumstantial evidence tending to exclude the possibility of independent conduct. *Id.* at 1025. We concluded the following "plus factors" were important when evaluating circumstantial evidence of concerted action:

> (1) whether the defendants' actions, if taken independently, would be contrary to their

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[7] We note that *Re/Max Int'l, Inc.* was an appeal from a grant of summary judgment. Here, our review is constrained by Fed. R. Civ. P. 12(b)(6). Nonetheless, plaintiffs argue they have put forth factual allegations that would make it reasonable to expect that discovery will reveal evidence of the *Re/Max* "plus factors." This analysis is instructive insofar as it illuminates the plausibility of defendants' lawful, unchoreographed free-market behavior.

> economic self-interest; (2) whether defendants have been uniform in their actions; (3) whether defendants have exchanged or have had the opportunity to exchange information relative to the alleged conspiracy; and (4) whether defendants have a common motive to conspire. Ordinarily, an affirmative answer to the first of these factors will consistently tend to exclude the likelihood of independent conduct.

Id. at 1009 (internal citation omitted).

Key to our decision in *Re/Max* was evidence that use of the adverse-splits policy would not be in either defendant's *independent* economic interest. If only one defendant adopted the policy, Re/Max agents would simply deal with the other defendant, and thus sales and revenue would shift away from one defendant to the other. *Id.* at 1010-11. Moreover, even if one defendant adopted the "adverse splits policy *on its own* (a 'highly unlikely' event in the first place)," the other local real estate firm had a strong incentive not to do likewise. *Id.* Thus, we concluded that the local firms' decision to adopt the adverse-splits policy, despite a natural inclination *not* to do so, was persuasive evidence of prior agreement. *Id.*

Citing *Re/Max*, plaintiffs assert that no rational airline would attempt to cut commission rates without entering into a prior agreement because the leader airline would lose revenue to its competitors. In support of this position, plaintiffs point to American's unsuccessful attempt to cut base commission rates

from 10% to 7% in 1983 and United's similar attempt to reduce base commission rates in 1981. Plaintiffs assert that both airlines quickly retracted their base commission cuts because the travel agencies retaliated by booking their customers on airlines that maintained the status quo commission rate. Plaintiffs contend that when one of defendants' competitors announced a base commission cut, each defendant had a strong incentive not to adopt that cut because its natural economic inclination would be to absorb any revenue shifted away from its competitor.

First, Michael Gunn, former Executive Vice President of Marketing and Planning at American, testified that an independent reduction in commission rates would advance each defendant's economic self-interest. Each defendant could have calculated reasonably that a successful commission cut would yield greater net revenue than the likely net loss due to business diverted by plaintiffs to their competitors. This decision is especially plausible in a marketplace that has changed fundamentally since 1983 due to technological advances in airline ticket purchasing. Defendants contend that new, alternate methods for airfare purchase – including direct purchases by customers on the internet – provided a greater economic incentive to cut commission rates on a trial-and-error basis. Defendants also assert that it was simple and inexpensive for a leader airline to innovate and then wait and see, with the hope and expectation that its competitors would institute similar cuts. If the industry did not follow, the leader

airline could simply retract the cut. Thus, defendants have offered a reasonable, alternative explanation for their parallel pricing behavior. In addition, if we follow plaintiffs' argument to its logical end, it is difficult to imagine a scenario where a commission cut could *ever* occur without collusion. Based on these facts, we conclude that each defendant had a reasonable, independent economic interest in adopting a competitor's commission cut rather than to maintain the status quo.

We therefore hold that plaintiffs have failed to allege sufficient facts plausibly suggesting (not merely consistent with) an agreement in violation of § 1 of the Sherman Act because defendants' conduct "was not only compatible with, but indeed was more likely explained by, lawful, unchoreographed free-market behavior." *Ashcroft v. Iqbal*, 129 S. Ct. at 1950.[8]

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[8] We note that plaintiffs opted-out of a class action that alleged an identical § 1 claim against these defendants. *Hall v. United Air Lines, Inc.*, 296 F. Supp. 2d 652 (E.D.N.C. 2003), *aff'd sub nom. Hall v. Am. Airlines, Inc.*, 118 F. App'x 680 (4th Cir. 2004). In *Hall*, the district court granted summary judgment in favor of defendants, finding "overwhelmingly compelling evidence that the commission cuts and caps . . . were just as likely the result of competitive conduct and natural changes in the market as of the illegal conspiracy alleged by plaintiffs." *Id.* at 671. Although a district court decision affirmed by the Fourth Circuit is not authoritative in the Sixth Circuit, we think that the result in *Hall* is something we should at least consider (when analyzing plausibility), "both for its persuasive power, and because it involves the same facts." *Premier Elec. Constr. Co. v. Nat'l Elec. Contractors Ass'n, Inc.*, 814 F.2d 358, 367 (7th Cir. 1987) (citation omitted) (considering Fourth Circuit decision

(Continued on following page)

Pursuant to *Twombly,* district courts must assess the plausibility of an alleged illegal agreement *before* parties are forced to engage in protracted litigation and bear excessive discovery costs. *Twombly,* 550 U.S. at 558-59. In this regard, we note that the plausibility of plaintiffs' conspiracy claim is inversely correlated to the magnitude of defendants' economic self-interest in making the cuts.[9] *See Matsushita,* 475 U.S. at 57 (defining ambiguous evidence as that which is as consistent with permissible competition as with illegal conspiracy). We are not persuaded by plaintiffs' argument that defendants would not seek to reduce base commissions independently, especially during the late 1990s and into 2002, where changes in the marketplace provided consumers with alternate ticket-purchasing options. As the Court stated in *Twombly,* "there is no reason to infer that [these defendants] had agreed among themselves to do what was only natural anyway." 550 U.S. at 566.

Next, plaintiffs rely upon ¶ 87 of their Amended Complaint, which includes an excerpt from the

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in antitrust action involving defendants whose activities spanned more than one court of appeals). We also acknowledge the Seventh Circuit's statement in *Premier,* which warned, "[o]nly the gravest reasons should lead [a] court in [an] opt-out suit to come to a conclusion that departs from that in the class suit." *Id.* at 367-68.

[9] Defendants assert that "each percentage point reduction in travel agent commissions was worth approximately $56 million, and that by 2002, the combined value of the commission cuts was more than a billion dollars."

deposition of Michael Gunn. Gunn testified that "industry consensus" on new commission levels was necessary for the commission cuts and caps to hold. Gunn also testified that "he had to match commission cuts exactly or he would undercut the movement." Plaintiffs argue that Gunn's testimony provides strong evidence of an antecedent agreement. We disagree.

The district court reviewed Gunn's deposition testimony in its entirety and carefully considered all of the factual allegations which, taken as true, could plausibly imply that defendants entered into a preceding agreement. After doing so, the district court ruled that there were insufficient facts to raise a reasonable expectation that discovery would reveal evidence of an illegal agreement. In reaching its conclusion, the district court noted the importance of the following portion of Gunn's testimony:

> Q. [Mr. Alioto (counsel for plaintiff)]: It was, in fact, represented to you by another person at American that in order for these reductions of commissions to work that you had to get common agreement of the industry; that was the most important thing?
>
> A. [Mr. Gunn]: I would respond again that my belief is you have to be matched if the cut is to be [successful]. But I don't know I don't care if there's a common agreement or other. All I care about is how people behave if I do something or how I believe if they do something. To me that's not consensus. That's taking a common action after the fact which is to me a lot different than consensus.

> Consensus speaks to prior agreement. There certainly wasn't any prior agreement in these cases.

Based on the facts alleged by plaintiffs, it is just as likely that American's 2001 commission cap was an effort to reduce its internal commission costs, with the ancillary hope that its competitors would follow its lead. As stated by a respected antitrust authority:

> When one oligopolist raises its price, each of its rivals must decide whether to follow. Continuing the previous price would allow each of the others to increase its sales if the leader persists in charging a higher price. But each knows that the leader is likely to retract an increase that is not followed. Accordingly, each rival asks itself whether it is better off at the lower price when it is charged by all or at the higher price when charged by all. If the latter, as will often be the case, the leader's price increase is likely to be followed.
>
> * * *
>
> The price leader may assume that others have made a similar calculation about which price will maximize profits. Or the leader may simply proceed by trial and error: raise the price and see what happens, especially where reversing an unfollowed price rise is not very costly.

6 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 1410b (2d ed.2003).

In addition, the matching of American's 2001 commission cap by the other defendants is not necessarily indicative of prior agreement. On this issue, the Seventh Circuit has observed that:

> [a] firm in a concentrated industry typically has reason to decide (individually) to copy an industry leader. After all, a higher-than-leader's price might lead a customer to buy elsewhere, while a lower-than-leader's price might simply lead competitors to match the lower price, reducing profits for all. One does not need an agreement to bring about this kind of follow-the-leader effect in a concentrated industry.

Reserve Supply Corp. v. Owens-Corning Fiberglas Corp., 971 F.2d 37, 53 (7th Cir. 1992). Thus, each defendant's decision to match a new commission cut was arguably a reasoned, prudent business decision. Moreover, if each defendant asked "itself" whether it was "better off" paying base commissions (paid by all) or not paying base commissions (eliminated by all), each defendant would plausibly elect the latter (from a purely economic standpoint).

Plaintiffs also argue that their factual allegations regarding defendants' opportunities to conspire are enough to nudge their § 1 claim across the line from conceivable to plausible. *Twombly,* 550 U.S. at 570. Specifically, plaintiffs rely upon ¶ 100, which alleges that "an Executive Vice-President of Marketing & Distribution for Northwest Airlines, a Senior Vice President of Planning for US Air, and a Senior Vice

President of Marketing for American met for three hours in a Dallas hotel conference room"; and upon ¶ 102 as well, which avers that "in 2001, a Delta senior executive met for a weekend of golf and socializing at the home of an American executive responsible for setting American's commission levels. Four months later, American led an industry-wide reduction on commission caps from $20 to $10. . . ."

However, plaintiffs' Amended Complaint does not cite any specific meetings that involved both Continental and American, the only two remaining defendants. The fact that American and Continental gathered at industry trade association meetings during the seven-year period when defendants reduced commission rates should not weigh heavily in favor of suspecting collusion. The Supreme Court rejected a similar argument in *Twombly*:

> From the allegation that [defendants] belong to various trade associations, . . . the dissent playfully suggests that they conspired to restrain trade, an inference said to be buttressed by the common sense of Adam Smith. If Adam Smith is peering down today, he may be surprised to learn that his tongue-in-cheek remark would be authority to force his famous pinmaker to devote financial and human capital to hire lawyers, prepare for depositions, and otherwise fend off allegations of conspiracy; all this just because he belonged to the same trade guild as one of his competitors when their pins carried the same price tag.

Twombly, 550 U.S. at 567 n.12 (internal citation omitted). Moreover, a mere opportunity to conspire does not, standing alone, plausibly suggest an illegal agreement because American's and Continental's presence at such trade meetings is more likely explained by their lawful, free-market behavior. *Iqbal*, 129 S. Ct. at 1950.

Finally, plaintiffs argue that we should rely upon a statement made in 1983 by a former American Airlines executive who "approved commission cuts that are the subject of this action." Plaintiffs allege that this unnamed American executive encouraged an executive of a competitor airline (also unnamed) to increase its fares by 20% to "make more money."

Plaintiffs presumably refer to a statement made by Robert Crandall, former President of American, to Howard Putnam, former President of the now-defunct Braniff airlines. *See United States v. Am. Airlines*, 743 F.2d 1114, 1116 (5th Cir. 1984). First, we note that Crandall made this statement more than twenty-five years ago. Second, the Amended Complaint avers only that Crandall "approved commission cuts" and fails to allege that he was actually involved in the conspiracy at issue here. In addition, we note that Crandall retired from American in 1998, placing his departure as CEO at the very beginning of plaintiffs' conspiratorial time line.

We conclude that Crandall's prior statement is too remote in time to support a plausible inference of agreement. We also do not view his statement as

tending to raise a reasonable expectation that discovery will reveal evidence of an illegal agreement between Continental and American. *See Twombly*, 550 U.S. at 555-56.

IV.

For these reasons, we affirm the judgment of the district court.

DISSENT

MERRITT, Circuit Judge, dissenting. In the recent *Twombly* and *Iqbal* cases, quoted and discussed at length by my colleagues in their majority opinion, the Supreme Court has started to modify somewhat, but not drastically, the notice pleading rules that have reigned under *Conley v. Gibson*, 355 U.S. 41, 45 (1957) ("a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief"). These two cases now require more than simple notice and conclusory statements of ultimate facts about the case. Instead plaintiffs must plead "sufficient factual matter" to state a legal claim or cause of action that is not only "conceivable" but also "plausible," independently of the notice given and the legal conclusions stated – in short, a set of "well-pleaded

factual allegations" that make the cause of action "plausible." *Iqbal*, 129 S. Ct. at 1949-51 (2009). The Supreme Court majority has made clear that it is not making a major change in the law of pleading with *Twombly* and its progeny.[1]

As with any other new, general legal standard, the nature and meaning of the newly modified standard can be understood and followed only by analyzing how the standard is applied in actual cases like this case. Here my colleagues have seriously misapplied the new standard by requiring not simple "plausibility," but by requiring the plaintiff to present at the pleading stage a strong probability of winning the case and excluding any possibility that the defendants acted independently and not in unison. My colleagues are requiring the plaintiff to offer detailed facts that if true would create a clear and convincing case of antitrust liability at trial without allowing the plaintiff the normal right to conduct discovery and have the jury draw reasonable inferences of liability from strong direct and circumstantial evidence.

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[1] The Court has been careful to point out that *Twombly* should not be read to impose a "probability requirement," or a "'heightened' pleading standard." *Twombly*, 550 U.S. at 556, 595 n. 14. The Court commented that an otherwise "well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and that recovery is very remote and unlikely." *Id.* at 556 (internal quotations omitted).

I.

Twombly itself was a telephone antitrust case in which the only non-conclusory factual allegations in the complaint of a "contract, combination or conspiracy in restraint of trade" was that the former Baby Bell telephone companies continued to do business in their former home territories and did not "attack" and try to take market share away from the other operating Baby Bell companies in their home region. This was the full extent of the *Twombly* factual allegations of anti-competitive behavior. There was no allegation of action, as opposed to nonaction, misfeasance as opposed to nonfeasance. The Supreme Court sensibly pointed out that there could be many explanations for this similar economic nonaction other than the kind of agreement not to compete required for liability under § 1 of the Sherman Act. Thus the Supreme Court held that this one specific factual allegation of similar conduct was insufficient alone to state a "plausible" claim, though the Court seems to say that this kind of factual statement alone makes the pleading issue "close." *Twombly*, 550 U.S. at 557 ("allegation of parallel conduct . . . gets the complaint close to stating a claim").

If the *Twombly* pleading issue was "close," but insufficient, based only on similar, stand-pat nonfeasance toward each other's historical territory, the allegations concerning the in unison, affirmative behavior of the airlines in this case are obviously sufficient. The factual allegations in this case create

an overwhelming case for the plaintiff to get by a motion to dismiss on the pleading.

Five times the airlines acted affirmatively, aggressively and publicly in unison to cut, fix and hold the price the airlines would pay the travel agents. Although at present there is no written contract to that effect, the facts alleged present so plain a case that they might as well have put the plan in writing.

1. The complaint alleges that United and American tried in 1981 and 1983, respectively, to fix the price lower to the travel agents but the other airlines would not go along. The allegations recite the statements of an American Airlines executive that the airlines learned not to try again until everyone was on board. The complaint alleges inside information tantamount to a partial confession.

2. Then when they tried again in 1995 the plan went like clock-work. Everyone followed the leader five straight times until the price reached zero. The allegations of fact, based on testimony of insiders, was that the plan could not work without agreement but could work if the airlines acted in unison. Since the plan worked like a charm, the allegations raise a strong inference of agreement. Not as strong as allegations raising an inference that "the sun will rise in the morning" based on history, but strong enough to be more than "plausible."

3. The airline executives in charge must not only have had hundreds of telephone conversations with each other and through intermediaries, but the

specific, time-and-place factual allegations are that they met frequently over the period the airlines were acting in unison and according to plan. To suggest that they did not ever in all the meetings and personal contacts discuss their union of interests and how the cuts were working defies belief. The father of laissez faire economic theory, the liberal Scottish moral philosopher, Adam Smith, made the same basic point even more forcefully in *The Wealth of Nations* (1776), 230 years ago: "People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public." Book 1, Chap. 10, part 1, 148 (New York: Modern Library, 2000). If the factual allegations of meetings are true – a matter not yet determined by an impartial fact finder – the case of liability is certainly strong enough to go to the jury.

4. The airlines, and specifically American Airlines' CEO Robert Crandall, attempted this type of coordinated scheme in the past. In 1984, Crandall was implicated in a price-fixing conspiracy because of comments he made to a competing airline president. In a recorded telephone conversation, the president of the competing airline asked Crandall how both airlines could continue to enjoy a monopoly over service to Dallas-Fort Worth International Airport, and Crandall instructed his competitor to raise its price and American would follow suit the very next day with a price increase of its own. *U.S. v. American Airlines, Inc.*, 743 F.2d 1114, 1116 (5th Cir. 1984). Having proposed to fall in line behind one another

before strongly suggests that the airlines would do it again. In fact, when Delta announced a cap on travel agent commission in 1995, Crandall was responsible for setting American Airline's travel agent commissions. Appellants' Reply Brief at 18. Unsurprisingly, American followed Delta's lead the very next day. *Id.*

To summarize, the complaint alleges that price cuts could not be made absent unilateral, follow-the-leader action by all of the defendants. It provides specific times and locations of numerous meetings attended by the defendants. Finally, and most importantly, the complaint ties the dates of those meetings with industry-wide simultaneous rate cuts that followed immediately thereafter. Reading these allegations as a whole, the complaint clearly satisfies the *Twombly* standard. In fact, the Supreme Court in *Twombly* noted that multiple competitors making "complex and historically unprecedented changes in pricing structure . . . for no other discernible reason" would properly state a claim under § 1 of the Sherman Act. 550 U.S. at 557 n. 4. That appears to be exactly the situation here.

II.

The antitrust cases decided in both courts of appeals and district courts since *Twombly and Iqbal* are few, and most of the cases decided by district courts have yet to reach the courts of appeals. *But see St. Clair v. Citizens Fin. Group*, No. 08-4870, 2009 WL 2186515 (3rd Cir. Jul. 23, 2009). That said,

district court judges across the country have dismissed a large majority of Sherman Act claims on the pleadings misinterpreting the standards from *Twombly* and *Iqbal*, thereby slowly eviscerating antitrust enforcement under the Sherman Act. *See, e.g.*, *In re Hawaiian & Guamanian Cabotage Antitrust Litig.*, No. 08-md-1972 TSZ, 2009 WL 2581510 (W.D. Wash. Aug. 18, 2009); *Bailey Lumber & Supply Co. v. Ga.-Pac.* Corp., No. 1:08CV1394LG-JMR, 2009 WL 2872307 (S.D. Miss. Aug. 10, 2009); *Burtch v. Milberg Factors, Inc.*, No. 07-556-JJF-LPS, 2009 WL 1529861 (D. Del. May 31, 2009).

The uniformity needed for the rule of law and equal justice to prevail is lacking. This irregularity may be attributed to the desire of some courts, like my colleagues here, to use the pleading rules to keep the market unregulated, while others refuse to use the pleading rules as a cover for knocking out antitrust claims. *Compare In re California Title Ins. Antitrust Litig.*, 2009 WL 1458025 (N.D. Cal. May 21, 2009) (dismissing price-fixing complaint against major title insurance agencies who jointly set rates in states where they belonged to statutorily authorized rate setting organizations and employed similar rates in other states) *with Standard Iron Works v. Arcelormittal*, No. 08-C-5214, 2009 WL 1657449 (N.D. Ill. 2009) (finding plausibility despite lack of direct evidence of collective action by looking at a series of industry meetings attended by steel executives that were followed by industry-wide production cuts).

III.

The Sherman Act was enacted in 1890 at the height and in the heat of controversy during a former Gilded Age. It was enacted to deter price fixing, market allocation among producers, and monopolization at a time of extreme disparities in economic power and wealth brought on by an extreme version of laissez faire economic theory.[2] After a long, slow climb toward a more equal distribution of economic power over the past century, in part because of the enforcement of the Sherman Act, we have recently returned to the great disparities that formerly existed. The failure to regulate the marketplace through antitrust enforcement is probably related to the mind-set that has dramatically reversed the earlier trend toward equality.[3]

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[2] *See* 21 Cong. Rec. 2460 (1889) (This inequality "has grown within a single generation out of the concentration of capital into vast combinations to control production and trade and to break down competition.").

[3] A picture of the recent reversal of the long trend toward equality is as follows:

(Continued on following page)

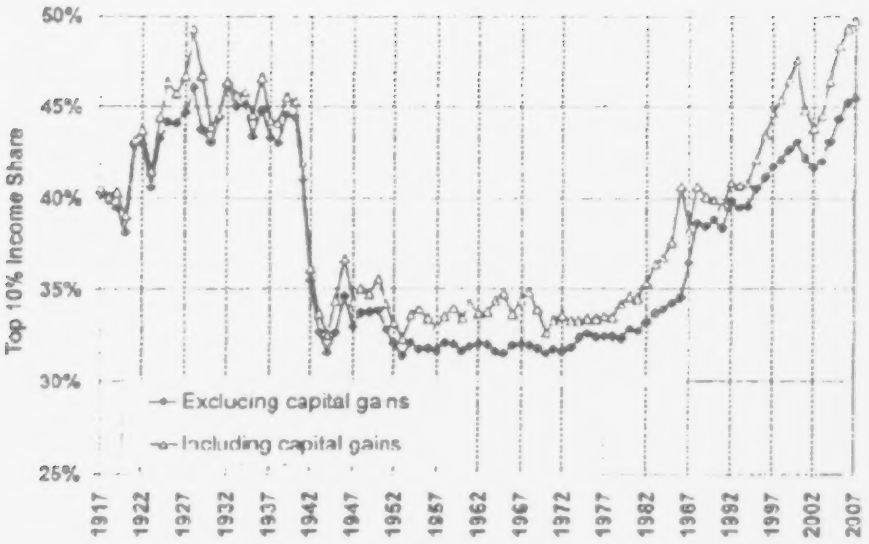

FIGURE 1
The Top Decile Income Share, 1917-2007

Source: Table A1 and Table A3, col. P90-100.

Income is defined as market income (and excludes government transfers). Top decile includes all families with annual income above $109,630 in 2007.

Forty years ago the average CEO made twenty times what the average worker did; now it is nearly 400 times. Thomas Piketty & Emmanuel Saez, Income Inequality in the United States: 1913-1998, 118 Q.J. Econ. 1 (2003), data updated through 2007 available at http://elsa.berkeley.edu/~saez/.

From the time of Herodotus in 500 B.C. to the present, historians and political philosophers have believed that a high level of inequality of economic and political power undermines the basis of constitutional democracy and stable government generally: "So the Athenians had increased in strength, which demonstrates that an equal voice in government has beneficial impact not merely in one way, but in every way." THE LANDMARK HERODOTUS: THE HISTORIES 400 (Robert B. Strassler ed. 2007). "The constitutional essential here is rather that below a certain level of material and social well-being, and of training and

(Continued on following page)

There are many, including my colleagues, whose preference for an unregulated laissez faire market place is so strong that they would eliminate market regulation through private antitrust enforcement. Using the new *Twombly* pleading rule, it is possible to do away with price fixing cases based on reasonable inferences from strong circumstantial evidence. As in this case, the proponents of this strategy propose to require either an express written agreement among competitors or a transcribed oral agreement to fix prices. Nothing less will do. Insider testimony, a strong motivation to collude, and aggressive, lock-step unanimity by competitors in pricing become insufficient to state a case. Over time, the antitrust laws fall further into desuetude as the legal system and the market place are manipulated to benefit economic power, cartels, and oligopolies capable of setting prices. This case is just one small step in that direction. But this direction is unlikely to be changed unless the Supreme Court steps in to make it clear that *Twombly* may not be used, as my colleagues propose, as a cover for repealing regulation of the marketplace through private antitrust enforcement.

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education, people simply cannot take part in society as citizens, much less equal citizens . . . it is what is required to give due weight to the idea of society as a fair system of cooperation between free and equal citizens. . . ." JOHN RAWLS, POLITICAL LIBERALISM 166 (1993).

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 07-4464

In re: TRAVEL AGENT COMMISSION ANTITRUST LITIGATION.

TAM TRAVEL, INC., et al.,

Plaintiffs-Appellants,

v.

DELTA AIRLINES, INC., et al.,

Defendants-Appellees.

Before: MERRITT, BOGGS, and GRIFFIN, Circuit Judges

JUDGMENT

(Filed Oct. 2, 2009)

On Appeal from the United States District Court for the Northern District of Ohio at Cleveland.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION WHEREOF, it is ORDERED that the judgment of the district court is AFFIRMED.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Leonard Green
Clerk

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO EASTERN DIVISION

IN RE: TRAVEL AGENT COMMISSION ANTI-TRUST LITIGATION	**MDL Docket No. 1561** **N.D. Ohio Case No. 1:03 CV 30000** **JUDGE PETER C. ECONOMUS**
This Document Relates To: ALL ACTIONS	**MEMORANDUM OPINION AND ORDER** (Filed Oct. 29, 2007)

This matter is before the Court upon Defendants' Motions to Dismiss Plaintiff's First Amended Complaint made pursuant to Rule 12(b)(6). Oral arguments were held on October 18, 2007.

I. BACKGROUND

The instant case is brought by travel agents who opted out of the plaintiff class in *Hall v. United Air Lines, Inc.*, 296 F. Supp. 2d 652 (E.D.N.C. 2003).[1] The

[1] The instant matter consists of two actions transferred to this court and coordinated for pretrial proceedings: (1) *Tam Travel, Inc., et al. v. Delta Airlines, Inc., et al.*, filed in the U.S. District Court for the Northern District of California on April 9, 2003; and (2) *Swope Travel Agency, Inc., et al. v. Orbitz, LLC, et al.*, filed in the U.S. District Court for the Eastern District of Texas on June 5, 2003. On November 10, 2003, the Judicial Panel on Multidistrict Litigation transferred *Tam* and *Swope* to this District pursuant to 28 U.S.C. § 1407 so that pretrial

(Continued on following page)

Court allowed Plaintiffs in the *Tam Travel* action to file an Amended Complaint on September 14, 2007, in light of the recent Supreme Court decision in *Bell Atlantic Corp. v. Twombly,* 127 S. Ct. 1955 (2007). Defendants, in turn, filed Motions to dismiss asserting that Plaintiffs cannot meet the new pleading standard enunciated by the Court in *Twombly.* Defendants Alaska Airlines, Inc. ("Alaska"), Alaska Air Group, Inc. ("AGA"), Air Tran Airlines, Inc. ("ATA"), American Airlines, Inc. ("American"), America West Airlines, Inc. ("AWA"), Continental, Airlines Inc. ("Continental"), Delta Airlines, Inc. ("Delta"), Horizon Air Industries ("Horizon"), Frontier Airlines, Inc. ("Frontier"), KLM Royal Dutch Airlines ("KLM"), Northwest Airlines, Inc. ("Northwest"), and United Airlines, Inc. ("United") filed the following eight Motions to Dismiss[2]:

> Motion to Dismiss First Amended Complaint filed by Northwest Airlines, Inc. (Dkt. #142)
>
> 12(b)(6) Motion to Dismiss Tam Travel Plaintiffs' First Amended Complaint Filed by 8 Moving Defendants (Dkt. #144)

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proceedings could be coordinated or consolidated with the case *Fausky, et al. v. American Airlines, et al.,* filed in this Court on May 8, 2003. (Master Dkt. #1). The *Fausky* case has since been dismissed. (*Fausky* Dkt. #25). *Tam* and *Swope,* however, remain before the Court.

[2] Plaintiffs dismissed U.S. Airways, Inc. and U.S. Airways Group on September 13, 2007 without prejudice.

Motion to Dismiss First Amended Complaint Filed by Delta Airlines, Inc. (Dkt. #145)

Motion to Dismiss the First Amended Complaint filed by Frontier Airlines (Dkt. #146)

Motion to Dismiss TAM Travel Plaintiffs' First Amended Complaint filed by America West Airlines, Inc. (Dkt. #147)

Motion to Dismiss First Amended Complaint Filed by Alaska Airlines (Dkt. #148)

Motion to Dismiss the First Amended Complaint Filed by United Airlines, Inc. (Dkt. #150)

Motion to Dismiss the First Amended Complaint Filed by ATA Airlines (Dkt. #166)[3]

II. STANDARD OF REVIEW

When presented with a motion to dismiss under Rule 12(b)(6), a court evaluates whether a plaintiff's complaint pleads a cognizable claim. *Gentile v. Fifth Ave. Otolaryngology, Inc.*, 2006 WL 2505915 (N.D. Ohio Aug. 28, 2006). All allegations in the complaint must be taken as true and construed in a light most favorable to the nonmovant. *Ang v. Proctor & Gamble Co.*, 932 F.2d 540, 544 (6th Cir. 1991). While the court

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[3] Although Defendant ATA filed its Motion to Dismiss on November 25, 2007, after the deadline, the Court will now consider ATA's Motion because it raises the same issues as the other seven Motions to Dismiss.

must accept a plaintiff's factual allegations as true, it "must not accept plaintiff's legal conclusions or unwarranted factual inferences as true." *Gentile*, 2006 WL 2505915, at *3 (citing *Lewis v. ACB Bus. Servs.*, 135 F.3d 389, 405-06 (6th Cir. 1998)).

A complaint alleging a conspiracy in violation of Section 1 of the Sherman Act, 15 U.S.C. §1, must set forth sufficient factual allegations "to raise a right to relief above the speculative level" and "to state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1965, 1974 (2007). To survive a motion to dismiss, the plaintiff must file "a complaint with enough factual matter (taken as true) to suggest that an agreement was made." *Id.* at 1965. Recently, the Supreme Court addressed the sufficiency of pleadings of a Section 1 Sherman Act claim under a Fed. R. Civ. P. 12(b)(6) standard, holding that "we do not require heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face." *Twombly*, 127 S. Ct. at 1974. As such, the Court did not mandate a "heightened" pleading of specific facts, but instead held that the facts themselves must "raise a reasonable expectation that discovery will reveal evidence of illegal agreement." *Id.* at 1965. It is under the "plausibility standard" set out in *Twombly* that the Defendant airlines contend that the Plaintiffs' antitrust claims must be dismissed.

In *Twombly*, the plaintiffs alleged that the defendants conspired to restrain trade by inflating charges for local telephone and high-speed Internet services.

Id. at 1962. The plaintiffs contended that there was a lack of meaningful competition in their telephone and Internet markets because the defendants had engaged in parallel conduct to prevent competition. *Id.* at 1962-63. The plaintiffs also stated that they had a "belief" that the defendants entered into a contract, combination or conspiracy to prevent competitive entry in their markets. *Id.* at 1963. In examining "what a plaintiff must plead in order to state a claim under § 1 of the Sherman Act," the Court determined that stating such a claim requires a complaint with enough factual matter (taken as true) to suggest that an agreement was made. "Asking for plausible grounds to infer an agreement does not impose a probability requirement at the pleading stage; it simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement." *Id.* at 1965. The Court went on to hold that "an allegation of parallel conduct and a bare assertion of conspiracy will not suffice. Without more, parallel conduct does not suggest conspiracy . . . when allegations of parallel conduct are set out in order to make a § 1 claim, they must be placed in a context that raises a suggestion of a preceeding agreement." *Id.* at 1966.

In applying the plausibility standard to the complaint, the Court concurred with the district court that the complaint failed because the plaintiffs based their claims on descriptions of parallel conduct, "and not on any independent allegation of actual agreement among [the defendants]." *Id.* at 1970. The Court

noted that the basis of the complaint concerned the alleged parallel conduct of the defendants to keep competitors out of their markets and implied that those actions demonstrated an illegal agreement on the part of the defendants. *Id.* at 1970-71. The Court therefore found that the supposed agreement between the defendants to disobey the 1996 Telecommunications Act was more of a natural and "unilateral reaction" of each defendant to resist competition, and that such individual actions by the defendants did not "plausibly suggest" an agreement or conspiracy by the defendants. *Id.* at 1971. Lastly, the Court emphasized that "we do not require heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face," stating that in a complaint a plaintiff must "nudge" its § 1 claim "across the line from conceivable to plausible." *Id.* at 1973.

In the instant case, Defendants request that in light of *Twombly*, the Court now determine [sic] whether Plaintiffs' Amended Complaint should be dismissed for failure to state a claim under FRCP 12(b)(6).

III. LAW AND ANALYSIS

The Court's construction of the Amended Complaint and Defendant's Motions to Dismiss reveals four distinct arguments: (1) Plaintiffs have failed to demonstrate parallel conduct with respect to AWA, Alaska, AGA, Frontier, and Horizon; (2) Plaintiffs failed to allege any facts regarding KLM's participation in

the alleged conspiracy; (3) Defendants Delta, United and Northwest's assertion that Plaintiff's Amended Complaint should be dismissed because they have been discharged in bankruptcy; and (4) Plaintiffs have not plead sufficient facts that "plausibly suggest" an agreement or conspiracy. The Court will address each set of arguments in turn.

A. AWA, Alaska, Frontier, and Horizon

Defendants AWA, Alaska, Frontier, and Horizon[4] contend that Plaintiffs are unable to demonstrate that they acted in parallel to reduce and eliminate travel commissions between 1995 and 2002. As stated earlier, the Court made clear in *Twombly*, "when allegations of parallel conduct are set out in order to make a § 1 claim, they must be placed in a context that raises a suggestion of preceding agreement, not merely parallel conduct that could just as well be independent action." *Id.* While the larger airlines focus on the allegations necessary to suggest the required context for a conspiracy claim (commonly referred to as "plus factors"), Defendants AWA, Alaska,

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[4] Plaintiff also names Alaska Air Group ("AGA"), a holding company, as a Defendant. AGA is mentioned by name only once in the Amended Complaint. As a holding company, Defendant AGA points out, it did not pay commissions to travel agents. (Dkt. #148). Therefore, Plaintiffs claims against AGA must be dismissed because there is no factual matter to plausibly suggest that AGA joined or participated in an unlawful conspiracy. *Twombly* 127 S. Ct. at 1956.

Frontier, and Horizon assert that Plaintiffs have failed to demonstrate parallel conduct because AWA, Alaska, Frontier, and Horizon did not have the same role in the reduction of travel agent commissions.

Plaintiffs allege that Defendants conspired to cap or cut the travel agent commissions on six separate occasions: 1995, 1997, 1998, 1999, 2001, and 2002.

1. 1995

In the Amended Complaint, Plaintiffs allege that in 1995, Delta, American, Northwest, United and Continental imposed a cap of $25 for one-way domestic tickets and $50 for round-trip domestic tickets. (Amend. Compl. ¶ 31). Plaintiffs do allege, however, that AWA, Alaska, Frontier, and Horizon imposed caps at this time.

2. 1997

Between September 18 and 25, 1997, United, American, Delta, Northwest, Continental, U.S. Airways, the airlines reduced commissions from 10 to 8 percent. (Amend. Compl. ¶ 34, 41). AWA reduced commissions a few days later, on September 29th and Alaska followed suit on September 30th. (Amend. Compl. ¶ 40). Frontier, however, did not reduce commissions until March 2008. (Amend. Compl. ¶ 41).

3. 1998

Between November 12 and December 2, 1998, United, American, Delta, Northwest, Continental and U.S. Airways imposed a cap on commissions on international tickets. (Amend. Compl. ¶ 43-39). The Amended Complaint does not allege that AWA, Alaska, Frontier, and Horizon implement such a cap on international commissions at this time.

4. 1999

On October 7, 1999, United reduced commissions again from 8 to 5 percent. (Amend. Compl. ¶ 51). American instituted the same reduction on October 8, with Delta and Northwest following on October 11. (Amend. Compl. ¶ 52-54). Continental and U.S. Airways then reduced commissions to 5 percent on October 12. (Amend. Compl. ¶ 55-56). AWA and Alaska followed suit on October 18, and Frontier implement [sic] the reduction on November 2. (Amend. Compl. ¶ 57-59).

5. 2001

On August 18, 2001, American capped commissions payable to travel agents on domestic flights at $10 and $20 for one-way and round-trip flights, respectively. (Amend. Compl. ¶ 61). On August 22, United and Delta implemented an identical cap, and Northwest and U.S. Airways followed suit the next day. (Amend. Compl. ¶ 64, 66). Contientnal [sic] and AWA announced their intention to implement the cap.

(Amend. Compl. ¶ 65, 67). Frontier and Alaska did not follow until September 4 and November 1, respectively. submit [sic] evidence that they did not impose the commission cap until nearly three weeks later. (Amend. Compl. ¶ 68, 69).

6. 2002

On March 14, 2002, Delta announced their intention to eliminate the travel agents' commissions completely. (Amend. Compl. ¶ 71). On March 18, American and Continental did the same. (Amend. Compl. ¶ 72, 75). Northwest followed the next day, and United eliminated the commissions on March 20. (Amend. Compl. ¶ 73, 74). On March 21, U.S. Airways and AWA followed suit. (Amend. Compl. ¶ 76, 77). On May 31, 2002, Frontier and Alaska also eliminated commissions completely. (Amend. Compl. ¶ 78, 79).

The above named airlines allege that on the six occasions they either: (1) did not follow the commission moves of their larger competitors at all; (2) when they did implement caps or cuts similar to those implemented by larger airlines, they followed the commission moves only after periods ranging from several weeks to six months; or (3) only implemented the caps or cuts partially.

"One does not need an agreement to bring about this kind of follow-the-leader effect in a concentrated industry." *Reserve Supply Corp. v. Owens Corning Fiberglas Corp.*, 971 F.3d 37, 53 (7th Cir. 1992); *United States v. Int'l Harvester Co.*, 274 U.S. 693,

708-709 (1927) ("The fact that competitors may see proper, in the exercise of their own judgment, to follow the prices of another [firm] does not establish any suppression of competition or show any sinister domination."). Plaintiffs have not put forth any "factual matter" suggesting that AWA, Alaska, Frontier, and Horizon engaged in parallel conduct because. according to the Amended Complaint, the four airlines either failed to implement the caps entirely or implemented the caps after the larger airlines. *Twombly,* 127 S. Ct. at 1965 ("stating a claim requires a complaint with enough factual matter (taken as true) to suggest agreement was made."). Absent such evidence, Plaintiffs claims against AWA, Alaska, Frontier, and Horizon must fail.

B. KLM

KLM asserts that Plaintiffs' Amended Complaint fails to allege that KLM "reduce[d], cap[ped] and eliminate[d] commissions paid to travel agencies and travel agents" at any time. (Amend. Compl. ¶ 32). As KLM points out, the Amended Complaint does not allege any specific action taken by KLM. (Dkt. #1 144). The only appearance of KLM in the Amended Complaint, other than its identification as a Defendant, is the allegation that KLM was represented at three trade association meetings. (Amend. Compl. ¶ 97, 98, 101). Because Plaintiffs failed to allege that KLM engaged in parallel conduct, the claims against KLM must also be dismissed.

C. Bankruptcy

Northwest, United, and Delta allege that Plaintiffs' Amended Complaint must be dismissed because it asserts a claim that has been discharged by the bankruptcy court. Delta, Northwest, and United point out that their reorganization plans were confirmed in 2007, 2005 and 2006, respectively. (Dkt. #143, 145, 150).[5] The commission reductions alleged by Plaintiffs, however, occurred between 1995 and March 2002. Therefore, Defendants assert that Plaintiffs' claims must be dismissed because they accrued in 2002, prior to Defendants' discharge in bankruptcy.

1. Public Records

Normally, when conducting a review of a 12(b)(6) motion to dismiss, the Court cannot consider facts outside the pleadings. In the instant case, Defendants attached to their Motions to Dismiss, copies of orders

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[5] Northwest, United and Delta each petitioned for Chapter 11 bankruptcy and had their reorgnization [sic] plan approved by the bankruptcy court. On December 9, 2002, United petitioned for Chapter 11 bankruptcy. On January 20, 2006, the bankruptcy court confirmed United's reorganization plan, which became effective February 1, 2006. (Dkt. #150). On September 14, 2005, Delta filed a petition for bankruptcy in United States Bankruptcy Court for the Southern District of New York. On April 25, 2007, the Bankruptcy Court entered an order confirming the reorganization plan, effective April 30, 2007. (Dkt. #145). On September 25, 2005, Northwest filed a Notice of Bankruptcy and the instant case was stayed against Northwest pursuant to section 362 of the Bankruptcy Code, 11 U.S.C. § 362(a)(1).

surrounding Defendants bankruptcy petitions. These orders are public records from United States Bankruptcy Courts and, therefore, possess the requisite level of reliability. Although the Court "must only take judicial notice of facts which are not subject to reasonable dispute," Plaintiffs refer to the bankruptcy proceedings in the Amended Complaint. *Passa v. City of Columbus,* 123 Fed. Appx. 694, 697 (6th Cir. 2005). As a result, consideration of the attachments does not require conversion of the motion into one for summary judgment under Rule 56. *Wyser-Pratte,* 413 F.3d at 560; *see also Palay v. United States,* 349 F.3d 418, 425 n.5 (7th Cir. 2003) (a district court is entitled to take judicial notice of matters in the public record). Therefore, the Court may review the public records relied upon by Defendants.

2. Continuing Antitrust Violation

Plaintiffs argue that even though Defendants were discharged in bankruptcy after the 2002 commission reduction, the alleged conspiracy to eliminate the travel agents' commissions was a "continuing conspiracy" because the airlines "continued to abide bye [sic] the conspiracy" after the commissions were capped in 2002. (Dkt. #152).

"In the context of a continuing conspiracy to violate the antitrust laws," a cause of action accrues "each time a plaintiff is injured by an act of the defendants." *Zenith Radio Corp. v. Hazeltine Research, Inc.,* 401 U.S. 321, 338 (1971). "Thus, 'even

when a plaintiff alleges a continuing violation, an overt act by the defendant is required to restart the statute of limitations and the statute runs from the last overt act.'" *Peck v. General Motors Corp.*, 894 F.2d 844, 849 (6th Cir. 1990) (quoting *Pace Indus., Inc. v. Three Phoenix Co.*, 813 F.2d 234, 237 (9th Cir. 1987)).

For purposes of claim accrual, the fact that an antitrust plaintiff may suffer continuing damages from an on-going conspiracy is irrelevant. In the antitrust context, "the focus is on the timing of the causes of injury, i.e., the defendant's overt acts, as opposed to the effects of the overt acts." *Id.* Accordingly, accrual of an antitrust claim depends on the commission of an "injurious act" rather than "the abatable but unabated inertial consequences" of that act. *Barnosky Oils, Inc. v. Union Oil Co. of California*, 665 F.2d 74, 81 (6th Cir. 1981) (quoting *Poster Exchange, Inc. v. National Screen Service Corp.*, 517 F.2d 117, 128 (5th Cir. 1975)). Although continuing damages may of course be recovered, "if a plaintiff feels the adverse impact of an antitrust conspiracy on a particular date, a cause of action immediately accrues to him to recover all damages incurred by that date and all provable damages that will flow in the future from the acts of the conspirators on that date." *Zenith*, 401 U.S. at 339.

Plaintiffs' Amended Complaint alleges that after the three airlines emerged from bankruptcy, they "had knowledge" of the alleged conspiracy, "ratified" the alleged conspiracy by failing to change its

policies, and has "never taken any action to disavow" the alleged conspiracy. (Amend. Compl. ¶ 116-118). To give rise to a new cause of action, "an overt act must have two elements: 1) It must be a new and independent act that is not merely a reaffirmation of a previous act; and 2) it must inflict new and accumulating injury on the plaintiff." *Martinez v. Western Ohio Health Care Corp.*, 872 F. Supp. 469, 472 (S.D. Ohio 1994); *see also Grand Rapids Plastics, Inc. v. Lakian,* 188 F.3d 401, 406 (6th Cir. 1999); *DXS, Inc. v. Siemens Med. Sys., Inc.* 100 F.3d 462, 467-68 (6th Cir. 1996); *Pace,* 813 F.2d at 238 (9th Cir. 1987). Thus, even if the airlines continued to participate in the conspiracy alleged by plaintiffs after having emerged from bankruptcy, that fact alone would not give rise to a new antitrust claim. *See, e.g., Varner v. Peterson Farms,* 371 F.3d 1011, 1019 (8th Cir. 2004) (where allegedly anticompetitive conduct was pursuant to previously agreed-upon contract, conduct did not give rise to antitrust claim, which had already accrued when contract was signed); *Kaw Valley Elec. Coop. Co. v. Kan. Elec. Power Coop., Inc.,* 872 F.2d 931, 933 (10th Cir. 1989) (continued conduct based on previously taken final decision does not create new antitrust claim); *Garelick v. Goerlich's, Inc.,* 323 F.2d 854, 856 (6th Cir. 1963) (continuation of previously initiated conduct does not give rise to a new antitrust claim); *Martinez,* 872 F. Supp. at 472 (antitrust defendant's continued adherence to a prior, allegedly unlawful decision, did not give rise to a new claim because the plaintiffs "continue to suffer the same

injury that was previously inflicted upon them, albeit in an ever increasing amount").

Plaintiffs allege that Delta, Northwest, and United "conformed" their "commission levels and caps" to those of the co-conspirators when it exited from Chapter 11. (Amend. Compl. ¶ 118). But that post-Chapter 11 "conformance" consisted solely of the airlines continuing the same commission policies that it had followed for years, both before and during its Chapter 11 proceeding. Therefore, Plaintiffs are unable to demonstrate an overt act other than the alleged commission reduction in 2002.

3. Pre-petition Debt

The formerly bankrupt Defendants assert that because Plaintiff's claim accrued in 2002, it is a pre-petition debt that cannot be brought against them. The Bankruptcy Code clearly provides that the confirmation of a reorganization plan discharges "any debt" owed by the debtor as of the date of confirmation, unless such plan provides otherwise. 11 U.S.C. § 1141(d)(1) ("Except as otherwise provided . . . in the plan, . . . the confirmation of a plan . . . discharges the debtor from any debt that arose before the date of such confirmation . . . whether or not . . . the holder of such claim has accepted the plan. . . .").

Delta, Northwest, and United's alleged liability to Plaintiffs constitutes a "debt" within the meaning of the Bankruptcy Code. The term "debt" is defined to mean "liability on a claim." 11 U.S.C. §101(12). The

term "claim" is, in turn, broadly defined to mean a "right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured." 11 U.S.C. § 101(5). As the Supreme Court has noted, "Congress intended by this language to adopt the broadest available definition of 'claim.'" *Johnson v. Home State Bank*, 501 U.S. 78, 83 (1991); *see also In re Jensen*, 995 F.2d 925, 930 (9th Cir. 1993). Congress adopted an all-encompassing definition of "claim" so that "all legal obligations of the debtor, no matter how remote or contingent, will be able to be dealt with in the bankruptcy case." H.R. REP. NO. 95-595, at 309 (1977). Accordingly, Plaintiffs' antitrust claims "constitute bankruptcy 'claims' within the meaning" of the Bankruptcy Code. *In re Penn Central Transp. Co.*, 771 F.2d 762, 766 (3d Cir. 1985).

The court-approved bankruptcy plans for Delta, United, and Northwest specifically provide that all pre-petition claims against the respective airlines were discharged. (Dkt. #150, Ex. A to Ex. 1, discharging against United, "Claims and Causes of Action of any nature whatsoever, . . . whether known or unknown, against . . . the Debtors . . . , including without limitation . . . Causes of Action that arose before the Confirmation Date"); (Dkt. #143, the Northwest plan provides that "all holders of claims . . . along with their respective present or former employees, agents, officers, directors or principals, shall be enjoined from taking any action to interfere with the

implementation or consummation of the Plan.); (Dkt. #145, *See id.* ¶ 78 (Delta's plan provides that, "upon the Effective Date, all existing claims against the Debtors and Interests in the Debtors shall be, and shall be deemed to be, discharged and terminated, and all holders of Claims and Interests shall be precluded and enjoined from asserting against the Reorganized Debtors.")

Because the three airlines were discharged in bankruptcy proceedings, Plaintiffs are permanently enjoined from pursuing their antitrust claim against Delta, Northwest, and United. By statute, the discharge of a debt "operates as an injunction against the commencement or continuation of an action to collect [or] recover . . . any such debt." 11 U.S.C. § 524(a)(2).

D. Joint Motion to Dismiss

Plaintiffs attempt to meet the *Twombly* standard against the remaining Defendant airlines – Continental and United – by pointing to five separate facts that suggest a conspiracy: (1) averments of parallel conduct; (2) opportunity to conspire; (3) evidence that the actions were against Defendants' self-interest; (4) evidence that information regarding the reduction of travel agent commissions was common knowledge; and (4) industry practice.

1. Gunn Deposition

Before proceeding to the legal analysis, it is necessary to address whether the deposition of American's executive Michael W. Gunn ("Gunn") is properly before the Court. Plaintiff's Amended Complaint refers to portions of Gunn's testimony. (Amend. Compl. ¶ 87). Defendants respond in their Motions to Dismiss, by referring to additional portions of Gunn's testimony that were not included in the Amended Complaint. (Dkt. #144).

As discussed with respect to the bankruptcy Defendants, Rule 12(b) of the Federal Rules of Civil Procedure provides that if "matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56." Under certain circumstances, however, a document that is not formally incorporated by reference or attached to a complaint may still be considered part of the pleadings. *See* 11 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 56.30[4] (3d ed. 1998). This occurs when "a document is referred to in the complaint and is central to the plaintiff's claim. . . ." *Id.* In such event, "the defendant may submit an authentic copy to the court to be considered on a motion to dismiss, and the court's consideration of the document does not require conversion of the motion to one for summary judgment." *Id.*; *see, e.g., Weiner v. Klais & Co.*, 108

F.3d 86, 89 (6th Cir. 1997) (considering pension plan documents that defendant attached to the motion to dismiss part of the pleadings because the documents were referred to in the complaint and were central to plaintiff's claim for benefits under the plan).

In the present case, the portions of Gunn's deposition referred to in the Amended Complaint are not "matters outside the pleadings." The deposition is referred to throughout the Amended Complaint and is central to the Plaintiffs' claims. The Court's consideration of the policies, therefore, does not require conversion of Defendants' motions to dismiss into a [sic] motions for summary judgment. *See Weiner*, 108 F.3d at 89. Furthermore, when "a document is referred to in the complaint and is central to the plaintiff's claim," the defendant "may submit an authentic copy to the court to be considered on a motion to dismiss, and the court's consideration of the document does not require conversion of the motion to one for summary judgment." *Id.* Therefore, the Court will also Consider Defendant's copy of Gunn's July 31, 2007 deposition attached to their motion to dismiss. (Dkt. #144, Ex. 3).

1. Parallel Conduct

In the Amended Complaint, Plaintiffs added a section titled "Simultaneity and Uniformity of Commission Cuts and Caps." Paragraph 28 states that "at a time unknown to Plaintiffs, Defendants, through their top executives and Chief Officers, agreed that

they would collectively act to cap, reduce and ultimately eliminate commissions paid to travel agents for the sale of airline tickets. (Amend. Compl. ¶28).

As the Court pointed out in *Twombly*, "a district court must retain the power to insist upon some specificity in pleading before allowing a potentially massive factual controversy to proceed." *Twombly*, 127 S. Ct. at 1966. There must be more than "a few stray statements [that] speak directly of agreement." *Id.* at 1970. For example, the plaintiffs in *Twombly* alleged that "ILECs engaged in a 'contract, combination or conspiracy' and agreed not to compete with one another." *Id.* The Court held that "on fair reading . . . [those] are merely legal conclusions." *Id.* Similarly, in *In re Elevator Antitrust Litig.*, the court held that, "averments of agreements made at some unidentified place and time . . . are insufficient to establish a plausible inference of agreement, and therefore to state a claim."

Plaintiffs' Amended Complaint alleges that Defendants took parallel actions to reduce or limit commissions paid to travel agents on six occasions, pointing to similar pricing and proximity in time as indications that Defendants conspired. As stated earlier, *Twombly* requires more than averments of parallel conduct, and "without some further factual enhancement it stops short of the line between possibility and plausibility of entitlement to relief." *Twombly*, 127 S. Ct. at 1966. Therefore, Plaintiffs assertion of parallel conduct alone is not enough to meet the requirements under *Twombly*. As a result,

the Court will now turn to the additional factual assertions Plaintiffs offer as evidence of the conspiracy.

2. Opportunities to Conspire

The Amended Complaint also includes an "Opportunities for Defendants to Combine and Conspire" Section. Specifically, Plaintiffs allege that Defendants met frequently during the period when the cuts and caps were allegedly negotiated. (Amend. Compl. ¶90-102). Additionally, Plaintiffs point out that Defendants had the opportunity to conspire at private meetings (Amend. Compl. ¶92); through industry associations (Amend, Compl. ¶93, 95, 97, 98); at trade shoes [sic] (Amend. Compl. ¶96); through jointly formed business ventures (Amen. [sic] Compl. ¶99); and while playing golf (Amend. Compl. ¶102).

Proof that Defendants had an opportunity to conspire does not satisfy Plaintiff's burden of proving a price-fixing agreement, *Petruzzi's IGA Supermarkets, Inc. v. Darlin-Delaware Co.*, 998 F.2d 1224, 124 n.15 (3rd Cir. 1993) ("Proof of opportunity to conspire, without more, will not sustain an inference that a conspiracy has taken place."); *Weit v. Continental Illinois National Bank*, 641 F.2d 457, 468-469 (7th Cir. 1981) (affirming directed verdict and noting that evidence that "points of contact or relationships for promotion of mutual interest existed among the defendants" did not give rise to an reasonable inference of conspiracy). Plaintiffs assertion of an

opportunity to conspire, without more, does not suggest that there was an agreement to reduce commissions.

3. Against Self-Interest

In a section of the Amended Complaint titled "Commission Cuts Against Defendants' Individual Self-Interest," Plaintiffs allege that "any airline unilaterally [reducing or capping travel agent commissions] would suffer a substantial loss of business when travel agents directed their customers to other airlines that had not reduced and/or capped." (Amen. [sic] Compl. ¶81). Plaintiffs support is not grounded in fact but merely a conclusory statement that airlines would reduce or cap commissions "only if a common understanding existed." *Id.* Plaintiffs only rely on United and American's failed attempt to institute commission reductions in the 1980s. (Amend. Compl. ¶ 85). Plaintiffs also allege that:

> On July 31, 2007, Michael Gunn, former Executive Vice President of Marketing and Planning of American testified that 'industry consensus' on new commission levels was necessary for the commission cuts and caps to hold. Mr. Gunn further testified that if any other Defendant set commission rates either above or below the new level, other Defendants would be forced to rescind the cuts. Mr. Gunn further testified that he had to match commission cuts exactly or he would undercut the movement by Defendants to reduce and cap commissions.

(Amend. Compl. ¶ 87). Defendants, however, cite a portion of Gunn's deposition transcript to counter Plaintiffs' assertion that "industry consensus" was necessary for commission cuts and caps to hold:

> Q: And that – would you agree that the most important issue was to gain the industry consensus that the commissions need to go down?
>
> A: No. I think the issue is we made a decision to cut the commissions. I hoped like heck that the competitors would follow, and to succeed they would have to follow. But that's their choice.
>
> Q: But that was the most important issue, that you had to gain industry consensus that the commissions need to go down. Otherwise, any effort by you would be futile.
>
> A: I don't think there was an issue. Maybe we are debating terminology here. It's not an issue of consensus. It's the issue of we initiated. If others followed, it would [succeed]. If they didn't, there was a likelihood it would not succeed.
>
> Q: Consensus means to you common agreement, doesn't it? Isn't that what consensus means?
>
> A: That sounds fair.
>
> Q: It was, in fact, represented to you by another person at American that in order for these reductions of commissions to work that

> you had to get common agreement of the industry; that was the most important thing?
>
> A: I would respond again that my belief is you have to be matched if the cut is to be [successful]. But I don't know I don't care if there's a common agreement or other. All I care about is how people behave if I do something or how I believe if they do something. To me that's not consensus. That's taking a common action after the fact which is to me a lot different than consensus. Consensus speaks to prior agreement. There certainly wasn't any prior agreement in these cases.

(Dkt. 144, Ex. 5).

To support an inference of conspiracy, "evidence of action that is against self-interest or motivated by profit must go beyond mere interdependence . . . [and] must be so unusual that in the absence of an advance agreement, no reasonable firm would have engaged in it." *Baby Food Antitrust Litigation*, 166 F.3d 112, 135 (3d Cir. 1999). The Sixth Circuit has also found that actions taken against self-interest are but one of several "plus factors" in analyzing anticompetitive behavior. *See Re/Max Int'l, Inc. v. Realty One, Inc.*, 173 F.3d 995, 1009 (6th Cir. 1999) (setting forth factors relevant in determining whether circumstantial evidence tends to exclude independent conduct and finding that a plaintiff's circumstantial evidence "must tend to exclude the possibility of independent conduct"). Gunn's deposition testimony

indicates that, although each Defendant airline hoped the others would match the commissions reductions because it would be more economically beneficial, there was no agreement or conspiracy to do so.

4. Common Knowledge

Plaintiffs also allege that each Defendant knew that the other airlines were reducing and capping travel agent commissions because the information was common knowledge. (Amend. Compl. ¶ 27, 29, 30). However, the Supreme Court has held that "the exchange of price data and other information among competitors does not invariably have anticompetitive effects; indeed such practices can in certain circumstances increase economic efficiency and render markets more, rather than less, competitive." *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 443 n.16, 57 L.Ed.2d 854, 98 S. Ct. 2864 (1978). Therefore, the Court does not find the availability of Defendants' commission rates for all to see as possible evidence of a conspiracy.

5. Industry Practice

Finally, Plaintiffs allege that a series of price fixing cases and investigations support their allegations that the airlines conspire to reduce the commissions of the travel agents. (Amend. Compl. ¶ 22-25). For example, Plaintiffs refer to the government investigation of a conspiracy involving computer reservation systems from the "late 1980s and early 1990s."

(Amend. Compl. ¶ 24). Plaintiffs also mention a current investigation of "a) a conspiracy to fix air-cargo rates, b) a cartel affecting fuel surcharges on passenger flights between Europe and the U.S., and c) a cartel involving surcharges on flights in Asia." (Amend. Compl. ¶ 25).

In *Hall v. United Airlines,* 296 F. Supp. 2d 652, a case that also involved an alleged Sherman Act Section 1 conspiracy regarding the reduction and elimination of travel agent base commissions paid by airlines, the district court found that past instances of collusion or alleged collusion are not relevant to an instant claim of conspiracy:

> [T]here appears to be "no case law . . . where 'history of collusion' is used as a plus factor courts consider in cases alleging illegal collusion in an oligopolistic market. The . . . 'history of collusion' in the industry does not tend to exclude the possibility that Defendants were engaged in lawful conduct during" the period relevant to the complaint.

Hall, 296 F. Supp. 2d 662 (citing *Williamson Oil Co., et al. v. Philip Morris Cos., et al.,* 231 F. Supp. 2d 1253, 1305 (N.D. Ga. 2002), *aff'd sub nom. Williamson Oil Co. v. Philip Morris USA,* 346 F.3d 1287 (11th Cir. 2003)); *aff'd Hall v. Am. Airlines, Inc.,* 118 Fed. Appx. 680, 683 (4th Cir. 2004).

The *Hall* court further held that "attempts to offer background of the 'anti-competitive conduct of the [airline] industry' by describing investigations by

the U.S. Department of Justice and other legal action taken against the airline industry relating to various forms of alleged anti-competitive conduct" is "not only completely immaterial to plaintiff's claim, but is also arguably prejudicial and these paragraphs will be stricken from the complaint." *Id.*

IV. CONCLUSION

For the foregoing reasons, Plaintiffs have failed to meet the pleading standards enunciated in *Twombly*. Therefore, Defendants Motions to Dismiss are **GRANTED**. (Dkt. #142, 144, 145, 146, 147, 148, 150, 166). As Plaintiffs' Amended Complaint fails to state a claim upon which relief can be granted, the instant case is hereby **DISMISSED**.

IT IS SO ORDERED.

***/s/ Peter C. Economus* – 10/29/07**
PETER C. ECONOMUS
UNITED STATES
DISTRICT JUDGE

No. 07-4464

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

IN RE: TRAVEL AGENT COMMISSION ANTI-TRUST LITIGATION.	)	
TAM TRAVEL, INC., ET AL., Plaintiffs-Appellants, v. DELTA AIRLINES, INC., ET AL., Defendants-Appellees.	)	ORDER (Filed Dec. 18, 2009)

BEFORE: MERRITT, BOGGS and GRIFFIN, Circuit Judges.

The court having received a petition for rehearing en banc, which was circulated to all active* judges of this court, none of whom requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the

* Judge Moore recused herself from participation in this ruling.

petition is denied. Judge Merritt would grant rehearing for the reasons stated in his dissent.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green

Leonard Green
Clerk

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

TAM TRAVEL, INC. d/b/a TAMALPAIS TRAVEL; TRAVEL GODDESS, INC. d/b/a UNIGLOBE HAPPY TRAVEL; MZZO, INC. d/b/a BEYOND TRAVEL; BONANZA WORLD TRAVEL, INC.; TJ KAP, INC. d/b/a MASTER KILBYS TRAVEL d/b/a SPORTSMANS TRAVEL d/b/a MASTER TRAVEL; A TEAM TRAVEL, INC. d/b/a A TEAM TRAVEL; A&W	) M.D.L Docket No. 1561) N.D. Ohio Case No. 03-30000) HON. PETER C. ECONOMUS) **FIRST AMENDED COMPLAINT FOR VIOLATIONS OF SECTION 1 OF THE SHERMAN ANTITRUST ACT**

TRAVEL, INC.; KATHERINE ARCELL, an individual; CHRISTINE WHALEN, an individual; BRENDA K. DAVIS AND ASSOCIATES, INC. d/b/a ALL DESTINATIONS TRAVEL; ALLWAYS TRAVEL, INC.; BRETON VILLAGE TRAVEL SERVICES, INC. d/b/a EASTLAKE TRAVEL SERVICES; EASTLAKE TRAVEL SERVICES, INC.; VILLAGE TRAVEL SERVICES, INC.; ADVENTURE TRAVEL, INC. d/b/a CARLSON WAGONLIT TRAVEL; GARAVANIAN TRAVEL, INC.; TALSON, INC. d/b/a CARLSON WAGONLIT TRAVEL d/b/a TRAVEL AGENTS INTERNATIONAL; COMPASS LTD. d/b/a AMBASSADOR TRAVEL; DELUXE TRAVEL, LLC d/b/a DELUXE TRAVEL LTD.; DESTINATIONS, INC. d/b/a DESTINATIONS INC., A TRAVEL COMPANY; EXCEL TRAVEL, INC.; ETC HOLDINGS, LTD. d/b/a EXECUTIVE TRAVEL CONSULTANTS, LTD.; ROZANNE KUNSTLE, an individual, d/b/a EXPRESS TRAVEL; STEVEN P. KUNSTLE, an

JURY TRIAL DEMANDED

(Filed Sep. 14, 2007)

individual d/b/a EXPRESS)
TRAVEL; GIDDEN, INC. d/b/a)
EXPRESS TRAVEL; FIVE)
STAR TRAVEL, INC.; CBD,)
INC. d/b/a A BETTER WAY)
TRAVEL SERVICE, d/b/a/)
A BETTER WAY TRAVEL,)
d/b/a A BETTER WAY TRAV-)
EL AGENCY, d/b/a GARDEN)
OF THE GODS TRAVEL SER-)
VICE, d/b/a GARDEN OF)
THE GODS TRAVEL, d/b/a)
GARDEN OF THE GODS)
TRAVEL AGENCY; JOHN R.)
DENNY, an individual d/b/a)
GARDEN OF THE GODS)
TRAVEL d/b/a GARDEN OF)
THE GODS TRAVEL SER-)
VICE d/b/a A BETTER WAY)
TRAVEL d/b/a A BETTER)
WAY TRAVEL SERVICE; Y.)
JOCELYN GARDNER, a sole)
proprietor d/b/a GATEWAY)
TRAVEL AND CRUISES,)
INC., d/b/a GATEWAY TRAV-)
EL SERVICES; GATEWAY)
TRAVEL AND CRUISES,)
INC.; GATEWAY TRAVEL,)
INC. d/b/a GATEWAY TRAV-)
EL AND CRUISES; LAGO)
TRAVEL, INC.; MAD TRAV-)
EL, INC.; MARINA BENZ,)
an individual; CAMELOT)
TOURS, INC. d/b/a MARINA'S)
TRAVEL; ROSEMARY)

D'AUGUSTA, an individual)
d/b/a PERNA TRAVEL SER-)
VICE d/b/a PERNA GOLF)
ADVENTURES d/b/a)
TRAVELBROKER.COM;)
PROFESSIONAL-WORLD)
TRAVEL, INC.; RED BIRD)
TRAVEL SERVICE, INC. d/b/a)
RED BIRD TRAVEL PLUS;)
GO EVERYWHERE, INC.)
d/b/a RIVERSIDE TRAVEL)
GROUP d/b/a RIVERSIDE)
TRAVEL; RUBINSOHN)
TRAVEL, INC., d/b/a)
RUBINSOHN TRAVEL SER-)
VICE; SONDRA RUSSELL,)
an individual d/b/a SANDY'S)
GET AWAY TRAVEL; SIL-)
HOUETTE TRAVEL, INC.;)
JUNE STANSBURY, an)
individual d/b/a STANSBURY)
TRAVEL d/b/a STANSBURY)
STERLING TRAVEL;)
STANSBURY TRAVEL LTD.;)
STANSBURY TRAVEL LLC;)
NANCY WALKER and J.)
MICHAEL WALKER, a)
partnership d/b/a SUNSET)
TRAVEL; UAT, INC. d/b/a)
THE TRAVEL STORE;)
THOMAS TRAVEL OF)
AMERICAN FORK, INC.;)
TOUR WEST TRAVEL OF)
AMERICAN FORK, INC.;)
LWK CORPORATION d/b/a)

TENNESSEE VALLEY TRAV-)
EL AGENCY; IMPERIAL)
TRAVEL BY DANA, LLC d/b/a)
UNIVERSAL TRAVEL;)
TRAVEL BY DANA, INC.;)
DESTINATIONS RESORT)
RESERVATIONS, INC. d/b/a)
GREENWOOD TRAVEL;)
THE TRAVEL CENTER, INC.;)
CAROLYN FJORD, an indi-)
vidual d/b/a TRAVEL EX-)
PRESS; TRAVEL KING, INC.;)
LEE GENTRY, an individual)
d/b/a TRAVEL KING.; NANCY)
RIESCH, an individual d/b/a)
TRAVEL PLUS; TRAVEL)
PLUS, NAR INC. d/b/a TRAV-)
EL PLUS; TRAVEL PROFES-)
SIONALS, INC.; TRAVEL)
TRAVEL, INC. d/b/a TRAVEL)
TRAVEL ERINDALE SQ.;)
WNMP TRAVEL, INC. d/b/a)
UNIGLOBE PROFESSIONAL)
TRAVEL; VIDAL TRAVEL,)
INC.; TALGOOD ENTER-)
PRISES, INC. d/b/a TALGOOD)
TRAVEL; WORLD TRAV-)
ELER, INC. d/b/a SUM-)
MERLIN TRAVEL, d/b/a)
CARLSON WAGONLIT)
SUMMERLIN TRAVEL, d/b/a)
GREEN VALLEY TRAVEL,)
d/b/a CARSON WAGONLIT)
GREEN VALLEY TRAVEL;)
WORLD TRAVELERS, INC.)

d/b/a TRAVEL, INC., d/b/a CARLSON WAGONLIT TRAVEL/TRAVEL, INC., d/b/a SUMMERLIN TRAVEL, d/b/a CARSON WAGONLIT SUMMERLIN TRAVEL, d/b/a GREEN VALLEY TRAVEL, d/b/a CARSON WAGONLIT GREEN VALLEY TRAVEL; and SATELLITE TRAVEL SYSTEMS, INC.,

Plaintiffs,

v.

DELTA AIR LINES, INC.; AMERICAN AIRLINES, INC.; UNITED AIR LINES, INC.; NORTHWEST AIRLINES, INC.; CONTINENTAL AIRLINES, INC.; US AIRWAYS, INC.; US AIRWAYS GROUP, Inc.; ALASKA AIR GROUP, INC; ALASKA AIRLINES, INC.; HORIZON AIR INDUSTRIES, INC.; AMERICA WEST AIRLINES, INC.; FRONTIER AIRLINES, INC.; ATA AIRLINES, INC.; HAWAIIAN AIRLINES, INC.; KLM ROYAL DUTCH AIRLINES; AIR CANADA,

Defendants.

Plaintiffs bring this private antitrust action under Sections 4 and 16 of the Clayton Antitrust Act, 15 U.S.C. §§15, 26, for damages and injunctive relief against Defendants for violations of Section 1 of the Sherman Antitrust Act, 15 U.S.C. §1, and demanding a trial by jury, allege and complain as follows:

JURISDICTION

1. This Court has jurisdiction pursuant to Sections 4 and 16 of the Clayton Antitrust Act, 15 U.S.C. §§15, 26 and 28 U.S.C. §§ 1331 and 1337(a).

VENUE

2. On November 10, 2003, the Judicial Panel on Multidistrict Litigation, pursuant to 28 U.S.C. § 1407 transferred this action to the Northern District of Ohio for coordinated and consolidated pretrial proceedings.

THE PARTIES

3. Each of the following Plaintiffs is a travel agency and/or travel agent that has sold air travel tickets, has received commissions for the sale of air travel tickets from one of [sic] more of the Defendants, and has been injured in its business or property by reason of Defendants' unlawful actions:

Plaintiffs	Representative(s)	City	State
Tam Travel, Inc. d/b/a Tamalpais Travel	Cynthia Prosterman	Corte Madera	California
Travel Goddess, Inc. d/b/a Uniglobe Happy Travel	Jan-Marie Brown	Carson City	Nevada
MZZO, Inc. d/b/a Beyond Travel	Lenny Marazzo	Reno	Nevada
Bonanza World Travel, Inc.	Sylvia Sparks	Carson City	Nevada
TJ Kap, Inc. d/b/a Master Kilby's Travel d/b/a Sportsman's Travel d/b/a Master Travel	David Wendell	Reno	Nevada
A Team Travel, Inc. d/b/a A Team Travel	Dean Bradt	Reno	Nevada
A&W Travel, Inc.; Katherine Arcell, an individual; Christine Whalen, an individual	Katherine Arcell, Christine Whalen	New Orleans	Louisiana
Brenda K. Davis and Associates, Inc. d/b/a All Destinations Travel	Brenda Davis	Mesquite	Texas
Allways Travel, Inc.	Donna Fry	Colorado Springs	Colorado

Breton Village Travel Services, Inc. d/b/a Eastlake Travel Services; Eastlake Travel Services, Inc.; Village Travel Services, Inc.	John Lovell	Grand Rapids	Michigan
Adventure Travel, Inc. d/b/a Carlson Wagonlit Travel	Michael Malaney	Grand Rapids	Michigan
Garavanian Travel, Inc.	Gabriel Garavanian	North Chelmsford	Massachusetts
Talson, Inc. d/b/a Carlson Wagonlit Travel	Gary Talewsky	Canton	Massachusetts
Compass Ltd. d/b/a/ Ambassador Travel	Robert Conway	Las Vegas	Nevada
Deluxe Travel, LLC d/b/a/ Deluxe Travel Ltd.	Jose Brito	Reno	Nevada
Destinations, Inc. d/b/a/ Destinations Inc., A Travel Company	Judy Crandall, Gail Kosach	Reno	Nevada
Excel Travel, Inc.	Ted Friedli	Long Branch	New Jersey
ETC Holdings, Ltd. d/b/a Executive Travel Consultants, Ltd.	Clyde Stensrud,	Bellevue	Washington

Rozanne Kunstle, An Individual, d/b/a Express Travel; Steven P. Kunstle, An Individual d/b/a Express Travel; Gidden, Inc. d/b/a Express Travel	Rozanne Kunstle, Steve Kunstle	Colorado Springs	Colorado
Five Star Travel, Inc. .	Sherry Lynne Stewart, Judith Anne Bray	Colorado Springs	Colorado
CBD, Inc. d/b/a A Better Way Travel Service, d/b/a a Better Way Travel, d/b/a A Better Way Travel Agency, d/b/a Garden of the Gods Travel Service, d/b/a Garden of the Gods Travel, d/b/a Garden of the Gods Travel	John R. Denny	Colorado Springs	Colorado
Y. Jocelyn Gardner, a sole proprietor d/b/a Gateway Travel and Cruises d/b/a Gateway Travel; Gateway Travel and Cruises, Inc.; Gateway Travel, Inc. d/b/a Gateway Travel and Cruises	Y. Jocelyn Gardner	Colorado Springs	Colorado

Lago Travel, Inc.	Maria Munecas	Guay-nabo	Puerto Rico
Mad Travel, Inc.	Lee McCarthy, Lisa McCarthy	Naples	Florida
Camelot Tours, Inc. d/b/a Marina's Travel	Marina Benz	Reno	Nevada
Rosemary D'Augusta, an individual, d/b/a Perna Travel Service, d/b/a Perna Golf Adventures, d/b/a Travelbroker.com	Rosemary D'Augusta	Bur-lingame	California
Professional World Travel, Inc.	Pam Ward	Richard-son	Texas
Red Bird Travel Service, Inc. d/b/a Red Bird Travel Plus	Donna Johnson	Desoto	Texas
Go Everywhere, Inc., d/b/a Riverside Travel Group, d/b/a Riverside Travel	Valerie Jolly	Arling-ton	Texas
Rubinsohn Travel, Inc., d/b/a Rubinsohn Travel Service	Bill Rubinsohn	Elkins Park	Penn-sylvania
Sandy Russell, an individual d/b/a Sandy's Get Away Travel	Sondra Russell	Waco	Texas

Silhouette Travel, Inc.	June Grepps, Pamela Faust, Vicki Rhoads, Donald Grepps	Cincinnati	Ohio
June Stansbury, an individual d/b/a Stansbury Travel d/b/a Stansbury Sterling Travel; Stansbury Travel Ltd.; Stansbury Travel LLC	June Stansbury	Reno	Nevada
J. Michael Walker and Nancy Walker, a partnership d/b/a Sunset Travel	J. Michael Walker, Nancy Walker	Grass Valley	California
UAT, Inc. d/b/a The Travel Store	Don Freeland, Loraine Freeland	Cincinnati	Ohio
Thomas Travel of American Fork, Inc.; Tour West Travel of American Fork, Inc.	Annette Tippetts	American Fork	Utah
LWK Corporation d/b/a Tennessee Valley Travel Agency	L. West Oehmig, Jr.	Chattanooga	Tennessee

Imperial Travel by Dana, LLC d/b/a Universal Travel; Travel by Dana, Inc.; Destinations Resort Reservations, Inc. d/b/a Greenwood Travel	Dana Robinson	Green-wood Village	Colorado
The Travel Center, Inc.	Suraj Zutshi, Donna Zutshi	Reno	Nevada
Carolyn Fjord, an individual d/b/a Travel Express	Carolyn Fjord	Davis	California
Lee Gentry, an individual d/b/a Travel King; Travel King, Inc.	Lee Gentry	Cincin-nati	Ohio
Nancy Riesch, an individual, d/b/a Travel Plus; Travel Plus NAR, Inc. d/b/a Travel Plus	Nancy Riesch	Monu-ment	Colorado
Travel Professionals, Inc.	Pat Meeuwsen, Pat Kamm, Russ Meeuwsen	Kalama-zoo	Michigan
Travel Travel, Inc. d/b/a Travel Travel Erindale Square	Robert Rosenthal, Gillian Rosenthal	Colorado Springs	Colorado

WNMP Travel, Inc. d/b/a Uniglobe Professional Travel	Deborah Pulfer, Steven Pulfer	Sidney	Ohio
Vidal Travel, Inc.	Ilana Glikman, Jay Glikman	Encino	California
Talgood Enterprises, Inc. d/b/a Talgood Travel	Wayne Taleff, Brett Goodson	Cincinnati	Ohio
World Traveler, Inc. d/b/a Summerlin Travel, d/b/a Carson Wagonlit Summerlin Travel, d/b/a Green Valley Travel, d/b/a Carson Wagonlit Green Valley Travel; World Travelers, Inc. d/b/a Travel, Inc., d/b/a Carlson Wagonlit Travel/Travel, Inc., d/b/a Summerlin Travel, d/b/a Carson Wagonlit Summerlin Travel, d/b/a Green Valley Travel, d/b/a Carson Wagonlit Green Valley Travel	Sharon Holmes-Reed	Las Vegas	Nevada
Satellite Travel Systems, Inc.	Diana Ultican	Bellevue	Washington

4. Defendant Delta Air Lines, Inc. ("Delta") is an airline incorporated under the laws of the State of Delaware, is found and transacts business in the Northern District of California, and has its principal place of business at Hartsfield Atlanta International Airport, 1030 Delta Boulevard; Atlanta, Georgia 30320.

5. Defendant American Airlines, Inc. ("American") is an airline incorporated under the laws of the State of Delaware, is found and transacts business in the Northern District of California, and has its principal place of business at 4333 Amon Carter Boulevard; Fort Worth, Texas 76155.

6. Defendant United Air Lines, Inc. ("United") is an airline incorporated under the laws of the State of Delaware, is found and transacts business in the Northern District of California, and has its principal place of business at 1200 East Algonquin Road; Elk Grove Township, Illinois 60007.

7. Defendant Northwest Airlines, Inc. ("Northwest") is an airline incorporated under the laws of the State of Minnesota, is found and transacts business in the Northern District of California, and has its principal place of business at 2700 Lone Oak Parkway; Eagan, Minnesota 55121.

8. Defendant Continental Airlines, Inc. ("Continental") is an airline incorporated under the laws of the State of Delaware, is found and transacts business in the Northern District of California, and

has its principal place of business at 1600 Smith Street; Houston, Texas 77002.

9. Defendant US Airways Group, Inc. is a company incorporated under the laws of the State of Delaware, and serves as a holding company for Defendants US Airways, Inc. ("US Airways") and America West Airlines, Inc. ("America West"), with whom it merged in 2005. US Airways Group, Inc. is found and transacts business in the Northern District of California, and has its principal place of business at 111 W. Rio Salado Parkway Tempe, AZ 85281.

10. Defendant Alaska Air Group, Inc. is a company incorporated under the laws of the State of Delaware, and serves as a holding company for Defendants Alaska Airlines, Inc. ("Alaska") and Horizon Air Industries, Inc. ("Horizon"), and maintains its principal place of business at 19300 Pacific Highway South; Seattle, Washington 98188. Alaska is incorporated under the laws of the State of Alaska, Horizon is incorporated under the laws of the State of Washington, and both are found and transact business in the Northern District of California.

11. Defendant Frontier Airlines, Inc. ("Frontier") is an airline incorporated under the laws of the State of Colorado, is found and transacts business in the Northern District of California, and has its principal place of business at Frontier Centre One, 7001 Tower Road; Denver, Colorado 80249.

12. Defendant ATA Airlines, Inc. ("ATA"), is an airline incorporated under the laws of the State of

Indiana, is found and transacts business in the Northern District of California, and has its principal place of business at 7337 West Washington Street; Indianapolis, Indiana 46231.

13. Defendant Hawaiian Airlines, Inc. ("Hawaiian") is an airline incorporated under the laws of the State of Delaware, is found and transacts business in the Northern District of California, and has its principal place of business at 3375 Koapaka Street, Suite G350; Honolulu, Hawaii 96819.

14. Defendant KLM Royal Dutch Airlines ("KLM") is an airline that is found and transacts business in the Northern District of California with its principal place of business at Amsterdamseweg 55, 1182GP Amstelveen, The Netherlands.

15. Defendant Air Canada ("Air Canada") is an airline that is found and transacts business in the Northern District of California with its principal place of business at 7373 Cote-Vertu Boulevard West; Saint-Laurent (Montreal), Quebec, Canada H4Y 1H4.

16. Various co-conspirators, including other persons, firms, partnerships, and/or corporations not named as Defendants in this complaint, including among others, Orbitz, Inc., the Airline Reporting Corporation, and various trade associations have aided, abetted, and/or participated with Defendants in the combination and conspiracy alleged herein and have performed acts and made statements in furtherance thereof.

EFFECT OF CONDUCT ON COMPETITION

17. Plaintiffs are and/or have been during the relevant time travel agencies and/or travel agents whose business includes the sale of Defendants' airline tickets.

18. Defendants' business is the commercial transportation of passengers by air within, between and among the states and foreign nations.

19. Defendants' air transportation of passengers within, between and among the states and foreign nations constitutes a substantial amount of interstate and foreign commerce, and Defendants' unlawful actions have affected and continue to affect a substantial amount of interstate and foreign commerce.

20. The booking of Defendants' tickets by travel agencies and/or travel agents for the air transportation of passengers within, between and among the states and foreign nations constitutes a substantial amount of interstate and foreign commerce, and Defendants' unlawful actions have affected and continue to affect a substantial amount of interstate and foreign commerce.

21. The payment to travel agencies and/or travel agents of commissions by Defendants in return for the booking of Defendants' tickets for air transportation of passengers within, between and among the states and foreign nations constitutes a substantial amount of interstate and foreign commerce, and Defendants' unlawful actions have affected and

continue to affect a substantial amount of interstate and foreign commerce.

CONDUCT GIVING RISE TO VIOLATIONS OF LAW

A. Industry History and Practice

22. Size carries with it an opportunity for abuse that is not to be ignored when the opportunity is proved to have been utilized in the past.

23. In 1983, an executive of Defendant American was involved in a price-fixing conspiracy taped by an executive of another airline, in which the American executive suggested that both airlines increase their fares by twenty percent to "make more money." The same executive served as American's Chief Executive Officer from 1995 to 1998 and approved commission cuts that are the subject of this action.

24. In the late 1980s and early 1990s, the major airlines in the United States, including Defendants in this case, engaged in a conspiracy to allocate markets and fix ticket prices by signaling to each other through computer reservation systems and by developing hub and spoke networks throughout the United States. Through this conspiracy, Defendants developed, implemented, and adopted a system and pattern and practice of communicating with each other by signaling and trade announcements and thereby forming tacit and implied agreements and

common understandings to restrain and suppress competition among themselves, to the prejudice and injury of consumers and the traveling public.

25. The United States Department of Justice is currently conducting an investigation into three separate price-fixing conspiracies involving Defendant airlines and dating back to 2000, including:

a) a conspiracy to fix air-cargo rates,

b) a cartel affecting fuel surcharges on passenger flights between Europe and the U.S., and

c) a cartel involving passenger flight fuel surcharges on flights in Asia.

In February, 2006, the United States Justice Department and the European Union conducted raids at the offices of several airlines, including several that are Defendants in this case. In August, 2007 British Airways PLC and Korean Air Lines Co. both pled guilty to participation in these conspiracies and have agreed to fully cooperate with the continuing U.S. government investigation.

B. Simultaneity and Uniformity of Commission Cuts and Caps

26. Beginning in 1995, Defendants initiated a collusive pattern of joint reductions in travel agent commissions, culminating in the elimination of all base commissions for travel agents in March 2002 as described hereafter.

27. Each Defendant knew that concerted action to reduce and cap commissions was contemplated and invited. Each Defendant adhered to the common scheme to reduce and cap commissions and participated in it. Each Defendant was advised that every other Defendant was invited to participate. Each Defendant knew that cooperation was essential to successful operation of the plan.

28. At a time unknown to Plaintiffs, Defendants, through their top executives and Chief Executive Officers, agreed that they would collectively act to cap, reduce and ultimately eliminate commissions paid to travel agents for the sale of airline tickets.

29. Defendants agreed that when one Defendant announced a commission cut or cap, the other Defendants would immediately follow suit with an identical action.

30. Defendants knew that it was necessary that their actions be concerted and identical for any commission reduction or cap to hold.

31. In 1995, Defendants Delta, American, Northwest, United and Continental combined and conspired to fix airline travel agent commissions by collectively imposing a commission cap of $25 for sales of one-way domestic tickets and $50 for sales of round-trip domestic tickets.

32. Beginning in approximately September 1997 and continuing up to and including the date of this complaint, in order to eliminate competition between

and among themselves for the sale of airline tickets through travel agencies and travel agents, Defendants combined and conspired to reduce, cap and eliminate commissions paid to travel agencies and travel agents, including Plaintiffs, in the United States, Puerto Rico and the United States Virgin Islands for the sale of Defendants' airline tickets for travel within the United States and to and from the United States and foreign nations.

1. 1997 Commission Cuts from 10% to 8%.

33. In furtherance of the Defendants' combination and conspiracy to eliminate competition between and among themselves, in or around September 1997 Defendants combined and conspired to reduce commissions paid to travel agents for the sale of Defendants' airline tickets from 10% to 8% of the ticket price.

34. On September 18, 1997, United announced its intention to reduce base commissions payable to travel agents on international and domestic airfares from 10% to 8%, effective on September 19, 1997. On September 19, 1997, United reduced commissions from 10% to 8%.

35. On September 23, 1997, American announced its intention to reduce base commissions payable to travel agents on international and domestic airfares from 10% to 8%, effective on September 23, 1997. On September 23, 1997, American reduced commissions from 10% to 8%. This reduction

by American was the same reduction undertaken earlier by the leader, United.

36. On September 23, 1997, Delta announced its intention to reduce base commissions payable to travel agents on international and domestic airfares from 10% to 8%, effective on September 23, 1997. On September 23, 1997, Delta reduced commissions from 10% to 8%. This reduction by Delta was the same reduction undertaken earlier by the leader, United.

37. On September 24, 1997, Northwest announced its intention to reduce base commissions payable to travel agents on international and domestic airfares from 10% to 8%, effective on September 24, 1997. On September 24, 1997, Northwest reduced commissions from 10% to 8%. This reduction by Northwest was the same reduction undertaken earlier by the leader, United.

38. On September 25, 1997, Continental announced its intention to reduce base commissions payable to travel agents on international and domestic airfares from 10% to 8%, effective on September 25, 1997. On September 25, 1997, Continental reduced commissions from 10% to 8%. This reduction by Continental was the same reduction undertaken earlier by the leader, United.

39. On September 24, 1997, US Airways announced its intention to reduce base commissions payable to travel agents on international and domestic airfares from 10% to 8%, effective on September 24, 1997. On September 24, 1997, US Airways

reduced commissions from 10% to 8%. This reduction by US Airways was the same reduction undertaken earlier by the leader, United.

40. On September 29, 1997, America West announced its intention to reduce base commissions payable to travel agents on international and domestic airfares from 10% to 8%, effective on September 29, 1997. On September 29, 1997, America West reduced commissions from 10% to 8%. This reduction by America West was the same reduction undertaken earlier by the leader, United.

41. On March 31, 1998, Frontier announced its intention to reduce base commissions payable to travel agents on international and domestic airfares, from 10% to 8%, effective on April 1, 1998. On April 1, 1998, Frontier reduced commissions from 10% to 8%. This reduction by Frontier was the same reduction undertaken earlier by the leader, United.

42. On September 30, 1997, Alaska announced its intention to reduce base commissions payable to travel agents on international and domestic airfares from 10% to 8%, effective on October 6, 1997. On October 6, 1997, Alaska reduced commissions from 10% to 8%. This reduction by Alaska was the same reduction undertaken earlier by the leader, United.

2. 1998 International Caps of $50 and $100

43. In furtherance of the Defendants' combination and conspiracy to eliminate competition between

and among themselves, beginning in November, 1998 Defendants combined and conspired to impose a cap of $50 for a one-way ticket and $100 for a round-trip tickets on commissions payable on international air travel tickets sold by travel agents.

44. On November 12, 1998, United announced its intention to cap commissions payable to travel agents on international airfares at $50 and $100 for one-way and round-trip flights, respectively, effective on November 12, 1998. On November 12, 1998, United capped commissions payable to travel agents on international airfares at $50 and $100 for one-way and round-trip flights, respectively.

45. On November 17, 1998, American announced its intention to cap commissions payable to travel agents on international airfares at $50 and $100 for one-way and round-trip flights, respectively, effective on November 17, 1998. On November 17, 1998, American capped commissions payable to travel agents on international airfares at $50 and $100 for one-way and round-trip flights, respectively. The level of caps set by American was the same level set earlier by the leader, United.

46. On November 17, 1998, Delta announced its intention to cap commissions payable to travel agents on international airfares at $50 and $100 for one-way and round-trip flights, respectively, effective on November 17, 1998. On November 17, 1998, Delta capped commissions payable to travel agents on international airfares at $50 and $100 for one-way

and round-trip flights, respectively. The level of caps set by Delta was the same level set earlier by the leader, United.

47. On November 23, 1998, Northwest announced its intention to cap commissions payable to travel agents on international airfares at $50 and $100 for one-way and round-trip flights, respectively, effective on November 23, 1998. On November 23, 1998, Northwest capped commissions payable to travel agents on international airfares at $50 and $100 for one-way and round-trip flights, respectively. The level of caps set by Northwest was the same level set earlier by the leader, United.

48. On November 20, 1998, Continental announced its intention to cap commissions payable to travel agents on international airfares at $50 and $100 for one-way and round-trip flights, respectively, effective on November 20, 1998. On November 20, 1998, Continental capped commissions payable to travel agents on international airfares at $50 and $100 for one-way and round-trip flights, respectively. The level of caps set by Continental was the same level set earlier by the leader, United.

49. On December 2, 1998, US Airways announced its intention to cap commissions payable to travel agents on international airfares at $50 and $100 for one-way and round-trip flights, respectively, effective on December 3, 1998. On December 3, 1998, US Airways capped commissions payable to travel agents on international airfares at $50 and $100 for

one-way and round-trip flights, respectively. The level of caps set by US Airways was the same level set earlier by the leader, United.

3. 1999 Commission Cuts from 8% to 5%

50. In furtherance of the Defendants' combination and conspiracy to eliminate competition between and among themselves, beginning in October 1999 Defendants combined and conspired to further reduce base commission payable on the sale of domestic tickets, from 8% to 5%.

51. On October 7, 1999, United announced its intention to reduce base commissions payable to travel agents on domestic and international tickets from 8% to 5%, effective on October 8, 1999. On October 8, 1999, United reduced base commissions payable to travel agents on domestic and international tickets from 8% to 5%.

52. On October 8, 1999, American announced its intention to reduce base commissions payable to travel agents on domestic and international tickets from 8% to 5%, effective on October 9, 1999. On October 9, 1999, American reduced base commissions payable to travel agents on domestic and international tickets from 8% to 5%. This reduction by American was the same reduction undertaken earlier by the leader, United.

53. On October 11, 1999, Delta announced its intention to reduce base commissions payable to

travel agents on domestic and international tickets from 8% to 5%, effective on October 11, 1999. On October 11, 1999, Delta reduced base commissions payable to travel agents on domestic and international tickets from 8% to 5%. This reduction by Delta was the same reduction undertaken earlier by the leader, United.

54. On October 11, 1999, Northwest announced its intention to reduce base commissions payable to travel agents on domestic and international tickets from 8% to 5%, effective on October 11, 1999. On October 11, 1999, Northwest reduced base commissions payable to travel agents on domestic and international tickets from 8% to 5%. This reduction by Northwest was the same reduction undertaken earlier by the leader, United.

55. On October 12, 1999, Continental announced its intention to reduce base commissions payable to travel agents on domestic and international tickets from 8% to 5%, effective on October 12, 1999. On October 12, 1999, Continental reduced base commissions payable to travel agents on domestic and international tickets from 8% to 5%. This reduction by Continental was the same reduction undertaken earlier by the leader, United.

56. On October 12, 1999, US Airways announced its intention to reduce base commissions payable to travel agents on domestic and international tickets from 8% to 5%, effective on October 13, 1999. On October 13, 1999, US Airways reduced base

commissions payable to travel agents on domestic and international tickets from 8% to 5%. This reduction by US Airways was the same reduction undertaken earlier by the leader, United.

57. On October 18, 1999, America West announced its intention to reduce base commissions payable to travel agents on domestic and international tickets from 8% to 5%, effective on October 18, 1999. On October 18, 1999, America West reduced base commissions payable to travel agents on domestic and international tickets from 8% to 5%. This reduction by America West was the same reduction undertaken earlier by the leader, United.

58. On November 2, 1999, Frontier announced its intention to reduce base commissions payable to travel agents on domestic and international tickets from 8% to 5%, effective on November 5, 1999. On November 5, 1999, Frontier reduced base commissions payable to travel agents on domestic and international tickets from 8% to 5%. This reduction by Frontier was the same reduction undertaken earlier by the leader, United.

59. On October 18, 1999, Alaska announced its intention to reduce base commissions payable to travel agents on domestic and international tickets from 8% to 5%, effective on October 19, 1999. On October 19, 1999, Alaska reduced base commissions payable to travel agents on domestic and international tickets from 8% to 5%. This reduction by

Alaska was the same reduction undertaken earlier by the leader, United.

4. 2001 Domestic Caps of $10 and $20

60. In furtherance of the Defendants' combination and conspiracy to eliminate competition between and among themselves, beginning in August of 2001, Defendants combined and conspired to impose caps of $10 for a one-way ticket and $20 for a round-trip ticket on commissions payable on domestic air travel tickets sold by travel agents.

61. On August 17, 2001, American announced its intention to cap commissions payable to travel agents on domestic flights at $10 and $20 for one-way and round-trip flights, respectively, effective on August 18, 2001. On August 18, 2001, American capped commissions payable to travel agents on domestic flights at $10 and $20 for one-way and round-trip flights, respectively.

62. On August 22, 2001, United announced its intention to cap commissions payable to travel agents on domestic flights at $10 and $20 for one-way and round-trip flights, respectively, effective on August 23, 2001. On August 23, 2001, United capped commissions payable to travel agents on domestic flights at $10 and $20 for one-way and round-trip flights, respectively. The level of caps set by United was the same level set earlier by the leader, American.

63. On August 22, 2001, Delta announced its intention to cap commissions payable to travel agents on domestic flights at $10 and $20 for one-way and round-trip flights, respectively, effective on August 22, 2001. On August 22, 2001, Delta capped commissions payable to travel agents on domestic flights at $10 and $20 for one-way and round-trip flights, respectively. The level of caps set by Delta was the same level set earlier by the leader, American.

64. On August 23, 2001, Northwest announced its intention to cap commissions payable to travel agents on domestic flights at $10 and $20 for one-way and round-trip flights, respectively, effective on August 24, 2001. On August 24, 2001, Northwest capped commissions payable to travel agents on domestic flights at $10 and $20 for one-way and round-trip flights, respectively. The level of caps set by Northwest was the same level set earlier by the leader, American.

65. On August 27, 2001, Continental announced its intention to cap commissions payable to travel agents on domestic flights at $10 and $20 for one-way and round-trip flights, respectively, effective on August 27, 2001. On August 27, 2001, Continental capped commissions payable to travel agents on domestic flights at $10 and $20 for one-way and round-trip flights, respectively. The level of caps set by Continental was the same level set earlier by the leader, American.

66. On August 23, 2001, US Airways announced its intention to cap commissions payable to travel agents on domestic flights at $10 and $20 for one-way and round-trip flights, respectively, effective on August 24, 2001. On August 24, 2001, US Airways capped commissions payable to travel agents on domestic flights at $10 and $20 for one-way and round-trip flights, respectively. The level of caps set by US Airways was the same level set earlier by the leader, American.

67. On August 27, 2001, America West announced its intention to cap commissions payable to travel agents on domestic flights at $10 and $20 for one-way and round-trip flights, respectively, effective on August 28, 2001. On August 28, 2001, America West capped commissions payable to travel agents on domestic flights at $10 and $20 for one-way and round-trip flights, respectively. The level of caps set by America West was the same level set earlier by the leader, American.

68. On September 4, 2001, Frontier announced its intention to cap commissions payable to travel agents on domestic flights at $10 and $20 for one-way and round-trip flights, respectively, effective on September 5, 2001. On September 5, 2001, Frontier capped commissions payable to travel agents on domestic flights at $10 and $20 for one-way and round-trip flights, respectively. The level of caps set by Frontier was the same level set earlier by the leader, American.

69. On November 1, 2001, Alaska announced its intention to cap commissions payable to travel agents on domestic flights at $10 and $20 for one-way and round-trip flights, respectively, effective on November 5, 2001. On November 5, 2001, Alaska capped commissions payable to travel agents on domestic flights at $10 and $20 for one-way and round-trip flights, respectively. The level of caps set by Alaska was the same level set earlier by the leader, American.

5. 2002 Commission Reductions From 5% to 0%

70. In furtherance of the Defendants' combination and conspiracy to eliminate competition between and among themselves, beginning in March, 2002 Defendants combined and conspired to further reduce base commission payable on the sale of domestic tickets from 5% to 0%, eliminating base commissions.

71. On March 14, 2002, Delta announced its intention to reduce base commissions payable to travel agents on domestic and international tickets from 5% to 0%, effective on March 14, 2002. On March 14, 2002, Delta reduced base commissions payable to travel agents on domestic and international tickets from 5% to 0%.

72. On March 18, 2002, American announced its intention to reduce base commissions payable to travel agents on domestic and international tickets from 5% to 0%, effective on March 18, 2002. On March 18, 2002, American reduced base commissions

payable to travel agents on domestic and international tickets from 5% to 0%. This reduction by American was the same reduction undertaken earlier by the leader, Delta.

73. On March 20, 2002, United announced its intention to reduce base commissions payable to travel agents on domestic and international tickets from 5% to 0%, effective on March 20, 2002. On March 20, 2002, United reduced base commissions payable to travel agents on domestic and international tickets from 5% to 0%. This reduction by United was the same reduction undertaken earlier by the leader, Delta.

74. On March 19, 2002, Northwest announced its intention to reduce base commissions payable to travel agents on domestic and international tickets from 5% to 0%, effective on March 19, 2002. On March 19, 2002, Northwest reduced base commissions payable to travel agents on domestic and international tickets from 5% to 0%. This reduction by Northwest was the same reduction undertaken earlier by the leader, Delta.

75. On March 18, 2002, Continental announced its intention to reduce base commissions payable to travel agents on domestic and international tickets from 5% to 0%, effective on March 18, 2002. On March 18, 2002, Continental reduced base commissions payable to travel agents on domestic and international tickets from 5% to 0%. This reduction

by Continental was the same reduction undertaken earlier by the leader, Delta.

76. On March 21, 2002, US Airways announced its intention to reduce base commissions payable to travel agents on domestic and international tickets from 5% to 0%, effective on March 21, 2002. On March 21, 2002, US Airways reduced base commissions payable to travel agents on domestic and international tickets from 5% to 0%. This reduction by US Airways was the same reduction undertaken earlier by the leader, Delta.

77. On March 21, 2002, America West announced its intention to reduce base commissions payable to travel agents on domestic and international tickets from 5% to 0%, effective on March 21, 2002. On March 21, 2002, America West reduced base commissions payable to travel agents on domestic and international tickets from 5% to 0%. This reduction by America West was the same reduction undertaken earlier by the leader, Delta.

78. On May 31, 2002, Frontier announced its intention to reduce base commissions payable to travel agents on domestic and international tickets from 5% to 0%, effective on May 31, 2002. On May 31, 2002, Frontier reduced base commissions payable to travel agents on domestic and international tickets from 5% to 0%. This reduction by Frontier was the same reduction undertaken earlier by the leader, Delta.

79. On May 31, 2002, Alaska announced its intention to reduce base commissions payable to travel agents on domestic and international tickets from 5% to 0%, effective on June 3, 2002. On June 3, 2002, Alaska reduced base commissions payable to travel agents on domestic and international tickets from 5% to 0%. This reduction by Alaska was the same reduction undertaken earlier by the leader, Delta.

80. The respective executives and/or Chief Executive Officers of the Defendant airlines approved each of the commission cuts and caps as alleged herein after being assured that their major competitors would follow suit.

C. Commission Cuts Against Defendants' Individual Self-interest

81. The conduct of each Defendant in reducing travel agent commissions and capping commissions was contrary to the economic self-interest of each Defendant if undertaken unilaterally and in the absence of a conspiracy, inasmuch as any airline unilaterally taking such action would suffer a substantial loss of business when travel agents directed their customers to other airlines that had not reduced and/or capped commissions.

82. Prior to the course of concerted conduct begun in 1995 to reduce travel agent commissions, Defendants unilaterally and unsuccessfully attempted to reduce commissions paid to travel agents.

83. Approximately in 1981, Defendant United lowered its commission rates by imposing a system of flat fee commissions, based on miles traveled per ticket. The system was in place for four to five days. When other carriers failed to follow suit, United withdrew its reduced commission program and reverted back to the pre-existing system of commission rates, so as not to lose business to other airlines by reason of travel agents' shifting business to those airlines paying higher commission rates.

84. Approximately in 1983, American Airlines announced that it would reduce its base commission payable to travel agents from 10% to 7%. The response of the travel agency community was vitriolic, including mail and phone calls to an American executive that denounced the cuts and threatened to book away travel to other airlines. Shortly thereafter, several of American's competitors indicated that they would stay at the then-industry standard 10 percent rate. When other carriers indicated that they would not follow American's lead, American withdrew its reduced commission program within 14 days and reverted back to the pre-existing system of commission rates, so as not to lose business to other airlines by reason of travel agents' shifting business to those airlines paying higher commission rates.

85. Because travel agents book a substantial percentage of air travel, no airline would rationally introduce and maintain a commission reduction independently, as the United and American experiments show; rather an airline would introduce and maintain

a reduction in travel agent commissions only if a common understanding existed that other airlines would do so.

86. Defendants' commission reductions and caps made economic sense only if Defendants had a common understanding and commitment to a common scheme that all of them would, in concert, reduce and cap travel agent commissions.

87. On July 31, 2007, Michael Gunn, former Executive Vice President of Marketing and Planning of American testified that "industry consensus" on new commission levels was necessary for the commission cuts and caps to hold. Mr. Gunn further testified that if any other Defendant set commission rates either above or below the new level, other Defendants would be forced to rescind their cuts. Mr. Gunn further testified that he had to match commission cuts exactly or he would undercut the movement by Defendants to reduce and cap commissions.

88. Commissions paid to travel agents were and are important incentives to travel agents to book passengers on a particular airline.

89. Defendants have and continue to pay commissions to travel agents through confidential "incentive agreements." Such payments are made to travel agents as an incentive to book on competitive routes and/or as back-end payments in the form of overrides. Some Defendants pay commission as high as 15% or more as an incentive to travel agents to

book on their airline on certain routes or to book certain passenger volumes.

D. Opportunities for Defendants to Combine and Conspire

90. Defendants' executives and/or other persons responsible for the setting of commission levels and caps met frequently during the period of cuts and caps. These meetings afforded these persons the opportunity to combine and conspire and with one another to cut and cap commissions on the sales of airline tickets.

91. At these meetings, Defendants communicated with one another for the purpose of developing, furthering, implementing, and/or maintaining their common plan to reduce, cap and eliminate commissions paid to travel agents and agencies for the sale of airline tickets.

92. During the period of commission cuts, Defendants' executives, including those responsible for setting travel agency commissions, were members and guests of an organization named "Conquistadores Del Cielo." Various Defendants' executives attended retreats held by this organization at least once a year.

93. Defendants jointly own the Airline Reporting Corporation ("ARC"). The ARC is an information clearinghouse that provides ticket distribution, reporting and settlement services for air carriers and travel agents. Through ARC, a Defendant airline was

and is able to monitor base commission rates paid by each and every other Defendant. ARC maintains a Board of Directors that selects membership of an "Advisory Council" whose role is to provide advice and guidance to ARC on matters affecting travel agents.

94. Defendants have entered into so-called alliances with one or more other Defendants for the purpose, among others, of jointly marketing their services. Executives and personnel of different Defendants who were responsible for the cutting and capping of commissions frequently communicated with one another in the creation and maintenance of these alliances during the period that commissions were being cut and capped.

95. Defendants' executives regularly meet and attend gatherings of the Air Transport Association.

96. Defendants' executives regularly attend and meet at conferences, including but not limited to the Japan Air Summit, the British Air Summit, the Paris Air Show, the Alex Brown Transportation Conference, the International Aviation Symposium, and the Merrill Lynch Conference.

97. On May 27th and 28th, 1997, representatives of Defendants United, KLM, Delta, and Air Canada, among others, attended a committee meeting of the International Air Transport Association ("IATA") held in Montreal, Canada at which participants discussed whether IATA members should rescind that organization's commission resolution

setting base commissions. Four months later, on September 18, 1997, United announced a reduction in base commissions from 10 percent to eight percent, applicable to both domestic and international flights. The other Defendants followed United's lead shortly thereafter.

98. In July, 1998 an IATA committee met in Singapore. In attendance were representatives of Defendants United, Air Canada, Delta, KLM, Northwest, and American, among others. An action taken at the meeting was to modify an IATA resolution that set base commissions at 9% so that the resolution no longer applied to Canada. Four months after this meeting, United announced that it would impose caps on commissions payable for international tickets issued in the United States and Canada. The other Defendants followed United's lead shortly thereafter.

99. In mid-1999, Defendants Delta, United, Northwest and Continental began discussions, later joined by American, that led ultimately to the formation of Orbitz, a jointly owned web site offering tickets to the public. The formation and operation of Orbitz brought together on a regular basis airline executives sharing the common objective of diverting customers away from travel agents to the internet. These same executives were involved in cutting travel agent commissions.

100. Also in mid-1999 an Executive Vice President of Marketing & Distribution for Northwest Airlines, a Senior Vice President of Planning for US

Air, and a Senior Vice President of Marketing for American met for three hours in a Dallas Hotel conference room.

101. Also in mid-1999 a committee of IATA met in Montreal, Canada. Attending were representatives of United, Air Canada, American, Delta, KLM, and Northwest, among others. An action taken at the meeting was to rescind the IATA resolution setting base commissions at 9%, effective August, 2000. Three months after this meeting, United announced that it was reducing U.S. base commissions from 8% to 5% for both domestic and international tickets. The other Defendants followed United's lead shortly thereafter.

102. In 2001, a Delta senior executive met for a weekend of golf and socializing at the home of an American executive responsible for setting American's commission levels. Four months later, American led an industry-wide reduction on commission caps from $20 to $10, the first time American had led any commission action since 1983. The other Defendants followed American's lead shortly thereafter.

E. Further Conduct Giving Rise to Violation of Law

103. Each time the airlines took a commission action, they acted substantially simultaneously. Their actions were separated by only a matter of days. The speed at which the airlines acted allowed insufficient time for independent study and analysis of the most

advantageous commission rate structure for each of the airlines.

104. The actions of the airlines marked a significant departure from established business practice. For more than a dozen years prior to the initial commission cut, airlines uniformly paid a base commission of 10 percent. Delta's imposition of caps on commissions in 1995 was an entirely novel structure among U.S. carrier, and yet American matched it in only one day. The other Defendants followed Delta's lead shortly thereafter.

105. By common design, Defendants structured their announcements to occur at different times to create the appearance of unilateral rather than concerted behavior.

106. Announcements of commission cuts and caps that were faxed by different Defendants to travel agents and agencies used identical or nearly identical language to describe the Defendant's intentions and actions.

107. Prior to Delta's initial public announcement of the March, 2002 elimination of base commissions, a sales representative of United told several travel agents that such changes were imminent.

108. At a travel agent conference in San Francisco on March 4, 2002, a representative of Orbitz told a travel agent that nothing "will matter very, very soon because something big is about to happen that will make Orbitz #1." Ten days later, on

March 14, 2002, Delta Airlines dropped base commissions from 5% to 0%. Other Defendants followed Delta's lead shortly thereafter.

F. Bankruptcy Defendants

109. A conspiracy in restraint of trade may be a continuing offense renewed each day of its continuance, and one who knowingly enters an illegal conspiracy intends to cause the injury that the conspiracy was designed to impose and is liable for injuries caused by the restraint of trade.

110. Delta entered Chapter 11 bankruptcy on September 14, 2005 and emerged on April 30, 2007.

111. United entered Chapter 11 bankruptcy on December 9, 2002 and emerged on February 1, 2006.

112. Northwest entered Chapter 11 bankruptcy on September 21, 2005 and emerged on May 31, 2007 (confirm)

113. ATA entered Chapter 11 bankruptcy on October 26, 2004 and emerged on Feb 28, 2006.

114. Hawaiian entered Chapter 11 bankruptcy on March 21, 2003 and emerged on June 2, 2005.

115. Air Canada entered Chapter 11 bankruptcy on April 1, 2003 and emerged on September 30, 2004.

116. US Airways entered Chapter 11 bankruptcy on August 11, 2002 and emerged on March 31,

2003. US Airways reentered bankruptcy on September 14, 2004 and reemerged on September 16, 2005.

117. Defendants Delta, United, Northwest, ATA, Hawaiian, Air Canada and US Airways, upon emerging from bankruptcy had knowledge of the conspiracy among Defendants to reduce, cap and eliminate commissions paid to travel agencies and travel agents.

118. Through their conduct of conforming to the commission levels and caps to which their co-conspirators had agreed, Defendants Delta, United, Northwest, ATA, Hawaiian, Air Canada and US Airways ratified the conspiracy among Defendants.

119. At no time have Defendants Delta, United, Northwest, ATA, Hawaiian, Air Canada or US Airways undertaken any action to affirmatively disavow the conspiracy among Defendants to reduce, cap and eliminate commission paid to travel agencies and travel agents.

ANTITRUST INJURY

120. Plaintiffs have been injured in their business and/or property by reason of the Defendants' violations alleged in this complaint in the following particulars, among others:

a) Plaintiffs received less commission revenue than they otherwise would have in a free, open and competitive marker

in the absence of the Defendants' conspiracy and combination;

b) Plaintiffs have suffered losses in the values of their businesses as going concerns by reason of the reduction of commission revenue they otherwise would have received in a free, open and competitive market in the absence of Defendants' conspiracy and combination.

121. The conduct of Defendants described hereinabove, and specifically the agreement between and among Defendants to reduce, cap and eliminate commissions paid to Plaintiffs for the sale of airline tickets constitutes a contract, combination or conspiracy to unreasonably restrain trade in that such is an agreement to fix prices, a *per se* violation of Section 1 of the Sherman Antitrust Act, 15 U.S.C. §1, pursuant to which Plaintiffs have proximately sustained injury and damage to their businesses and property, such that Plaintiffs are entitled to recover threefold such actual damages as the jury finds them to have sustained, the cost of suit, including a reasonable attorney's fee, and injunctive relief, pursuant to §§4 and 16 of the Clayton Antitrust Act, 15 U.S.C. §§15, 26.

TOLLING OF THE STATUTE OF LIMITATIONS

122. On June 21, 2000 a class action entitled *Sarah Futch Hall, et al v. American Airlines, et al* (Case Number 7-00-CV-123-BR) ("*Hall*") was filed in the United States District Court for the Eastern

District of North Carolina on behalf of "all travel agents in the United States, Puerto Rico, and the United States Virgin Islands, who, at any time from September 1, 1997 to the present issued tickets, miscellaneous charge orders (MCO) or prepaid tickets advices (PTA) for travel on any of the Defendant airlines." As a result of the filing of the Hall complaint, the statute of limitations with respect to Plaintiffs' claims against Defendants and their co-conspirators was tolled for all purposes on June 21, 2000.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray for judgment against the Defendants as follows:

1) That the Court find, adjudge, and decree that the Defendants have engaged in violations of the antitrust laws of the United States as set forth hereinabove;

2) That the Court award to Plaintiffs treble the amount of the actual damages found by the jury as provided by Section 4 of the Clayton Antitrust Act, 15 U.S.C. §15;

3) That the Court grant injunctive relief as provided by Section 16 of the Clayton Antitrust Act, 15 U.S.C. §26;

4) That the Court award to Plaintiffs the cost of suit, including a reasonable attorney's fee, as provided by Section 4

of the Clayton Antitrust Act, 15 U.S.C. §15;

5) That the Court grant to Plaintiffs such other and further relief to which the Plaintiffs are entitled, and the Court finds to be just in these proceedings.

CERTIFICATION OF INTERESTED ENTITIES OR PERSONS

Pursuant to Civil L.R. 3-16, the undersigned certifies that as of this date, other than the named parties, there is no such interest to report.

JURY DEMAND

Plaintiffs demand a trial by jury of all issues triable thereby, pursuant to the Seventh Amendment of the Constitution of the United States and Rule 38(b) of the Federal Rules of Civil Procedure.

Dated: September 14, 2007

By: /s/ Thomas P. Pier
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(2)

Supreme Court, U.S.
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No. 09-1138

IN THE

Supreme Court of the United States

TAM TRAVEL, INC., *et al.*,

Petitioners,

v.

AMERICAN AIRLINES, INC., *et al.*,

Respondents.

On Petition For A Writ Of Certiorari
To The United States Court of Appeals
for the Sixth Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly applied this Court's decision in *Bell Atlantic Corp.* v. *Twombly*, 550 U.S. 544 (2007), when it held that petitioners' first amended complaint did not state a claim for violation of Section 1 of the Sherman Act, 15 U.S.C. § 1 because the facts alleged did not plausibly suggest (and were merely consistent with) an agreement among airlines to cut and eliminate commissions paid to travel agents.

2. Whether under 11 U.S.C. § 1141(d)(1) confirmation of a defendant's bankruptcy plan discharges an antitrust claim that is predicated on pre-confirmation conduct.

RULE 29.6 STATEMENT

Respondent American Airlines, Inc. is a subsidiary of AMR Corporation, a publicly held company; no other publicly held company holds 10% or more of its stock.

Respondent Continental Airlines, Inc. is a publicly held company in which no publicly held company holds 10% or more of its stock.

Respondent United Air Lines, Inc. is a wholly owned subsidiary of UAL Corporation, a publicly held company.

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OTHER AUTHORITIES

Lee Goldman, *Trouble for Private Enforcement of the Sherman Act: Twombly, Pleading Standards, and the Oligopoly Problem*, 2008 B.Y.U.L.Rev. 1057 6

BRIEF FOR RESPONDENTS IN OPPOSITION

Respondents American Airlines, Inc., Continental Airlines, Inc., and United Air Lines, Inc. (collectively, "respondent airlines") respectfully submit this brief in opposition to the petition for a writ of certiorari.[1]

STATEMENT

Petitioners are forty-eight travel agents and travel agencies. In June 2000, a travel agent other than petitioners filed an action on behalf of a putative nationwide class of travel agents alleging that several airlines, including respondents here, violated Section 1 of the Sherman Act by unlawfully conspiring to reduce certain commissions historically paid by airlines to travel agents. *Hall* v. *United Air Lines, Inc.*, 296 F. Supp. 2d 652, 657 (E.D.N.C. 2003).

Defendants in *Hall* moved to dismiss on the grounds that various amended complaints did nothing more than allege parallel conduct coupled with a bald assertion that such conduct was the result of a conspiracy. The district court denied the motions to dismiss, relying on *Conley* v. *Gibson*, 355 U.S. 41, 45–46 (1957), for the proposition that dismissal "is proper only if it appears beyond reasonable doubt that the plaintiff can prove no set of facts in support of her claim that would entitle her to relief." Order Denying Motion to Dismiss at 3, *Hall* v. *United Air Lines, Inc.*, No. 7:00-CV-123-BR(1) (E.D.N.C. Feb. 21,

[1] Because Delta Air Lines, Inc. is no longer a party (see Pet. iv), in this Court the case is properly captioned—as reflected on the cover of this brief—*Tam Travel, Inc., et al.* v. *American Airlines, Inc., et al.* See S. Ct. R. 34.1(c).

2001). After "months of depositions, interrogatories, and requests for production of documents[,]" *Hall*, 296 F. Supp. 2d at 662, aff'd per curiam sub nom., *Hall* v. *Am. Airlines, Inc.*, 118 F. App'x. 680 (4th Cir. 2004), the district court granted summary judgment in favor of the defendant airlines, *id.* at 680–81, stating that defendants had offered "overwhelmingly compelling evidence that the commission cuts and caps that are the subject of this litigation were just as likely the result of competitive conduct and natural changes in the market as of the illegal conspiracy alleged by plaintiffs." *Id.* at 671.

Petitioners timely opted out of the class certified in *Hall* and filed this action in April 2003. Respondent airlines answered the original complaint without moving to dismiss. As discovery was being conducted, this Court decided *Bell Atlantic Corp.* v. *Twombly*, 550 U.S. 544 (2007). Respondent airlines moved for judgment on the pleadings under Federal Rule of Civil Procedure 15. The district court granted the motion.

Petitioners filed an amended complaint, which among other things alleged that a former American Airlines executive, Michael W. Gunn, testified that "'industry consensus' on new commission levels was necessary for the commission cuts and caps to hold." App. 111a, ¶ 87. The amended complaint also alleged that several airlines, including respondent United Air Lines, Inc. ("United"), entered Chapter 11 bankruptcy between 2002 and 2005 and, upon emerging from bankruptcy, "had knowledge" of the alleged conspiracy, did not "undertake[] any action to affirmatively disavow" the conspiracy, and "ratified" the alleged conspiracy by "conforming to the commission

levels and caps to which their co-conspirators had agreed." App. 118a, ¶¶ 117–119.

Respondent airlines moved to dismiss under Federal Rule of Civil Procedure 12(b)(6). In support of the motion, respondent airlines submitted the transcript of Mr. Gunn's deposition. At oral argument, petitioners' counsel consented to the district court's consideration of the deposition transcript. Addendum to Proof Brief of Appellees, Record Entry No. 176 at 59–60, *Tam Travel, Inc.* v. *Delta Air Lines, Inc.*, No. 07-4464 (6th Cir. June 26, 2008).

The district court dismissed the action. App. 71a. Petitioners timely appealed. The court of appeals affirmed, holding that: (i) "plaintiffs have failed to allege sufficient facts plausibly suggesting (not merely consistent with) an agreement in violation of § 1 of the Sherman Act because defendants' conduct 'was not only compatible with, but indeed was more likely explained by, lawful, unchoreographed free-market behavior'"; and (ii) United's continuation of its 0% commission policy after emerging from bankruptcy proceedings was not an overt act by which United rejoined the alleged conspiracy. App. 26a (quoting *Ashcroft* v. *Iqbal*, 556 U.S. ___, 129 S. Ct. 1937, 1950 (2009)); App. 11a–12a.

Petitioners filed a petition for rehearing en banc, which the court of appeals denied. App. 72a–73a.

DISCUSSION

This case presents two questions, neither of which requires intervention by this Court. The first question presented is whether, in assessing "what a plaintiff must plead in order to state a claim under § 1 of the Sherman Act," the court of appeals correctly applied this Court's decision in *Twombly*. The

second question is whether confirmation of a defendant's bankruptcy plan discharges an antitrust claim that is predicated on pre-confirmation conduct.

A. The Court Should Not Grant Review To Revisit The Question Decided in *Twombly*

In *Twombly*, this Court held that stating a § 1 claim "requires a complaint with enough factual matter (taken as true) to suggest that an agreement was made." 550 U.S. at 556. Further, "when allegations of parallel conduct are set out in order to make a § 1 claim, they must be placed in a context that raises a suggestion of a preceding agreement, not merely parallel conduct that could just as well be independent action." *Id.* at 557. Complaints therefore must contain "allegations plausibly suggesting (not merely consistent with) agreement." *Ibid.*

Petitioners claim that the decision in *Starr* v. *Sony BMG Music Entertainment*, 592 F.3d 314 (2d Cir. 2010), conflicts with the decision of the court of appeals below. In particular, petitioners point to the *Starr* court's rejection of a rule that to survive a motion to dismiss, a complaint alleging a violation of § 1 must allege facts that tend to exclude the possibility of independent action. Pet. 23, quoting *Starr*, 592 F.3d at 325 ("Defendants first argue that a plaintiff seeking damages under Section 1 of the Sherman act must allege facts that 'tend[ ] to exclude independent self-interested conduct as an explanation for defendants' parallel behavior.' * * *. This is incorrect.") (citation omitted).

There is no conflict among the circuits, however, because the court of appeals below did *not* adopt the rule rejected in *Starr*. Petitioners' claims of a conflict

rest entirely on their recasting of the court of appeals' holding.

For example, petitioners claim that the court of appeals held:

> [I]f a complaint satisfies *Twombly* by alleging facts placing the defendants' parallel behavior "in a context that raises a suggestion of preceding agreement," *Twombly*, 550 U.S. at 557, the complaint must nevertheless be dismissed unless it also "tends to exclude the possibility of independent action." App. 22a (citing *Monsanto Co.* v. *Spray-Rite Serv. Corp.*, 465 U.S. 752, 768 (1984)).

Pet. 18. But nowhere on the cited page of the appendix does the court of appeals announce a rule that if a complaint satisfies the standards set forth in *Twombly* it must nevertheless be dismissed unless it also satisfies an additional requirement that it allege facts tending to exclude the possibility of independent action. Instead, the court of appeals simply and correctly identified *Monsanto* as the case in which this Court "established the modern standard to evaluate evidence bearing on concerted action." App. 22a.

Further, the portion of the court of appeals' opinion cited by petitioners is not the court of appeals' holding. As petitioners elsewhere acknowledge (see Pet. 16, 24), the court of appeals' actual holding appears at App. 26a:

> We therefore hold that plaintiffs have failed to allege sufficient facts plausibly suggesting (not merely consistent with) an agreement in violation of § 1 of the Sherman Act because defendants' conduct "was not only compatible with,

> but indeed was more likely explained by, lawful, unchoreographed free-market behavior."

App. 26a (quoting *Iqbal*, 129 S. Ct. at 1950).[2]

This language, too, does not announce a rule that a complaint must allege facts that tend to exclude the possibility of independent action in order to survive a motion to dismiss for failure to state a claim or for judgment on the pleadings under Federal Rule of Civil Procedure 12(b)(6) or (c). Nor does it represent an improper application of the standard applicable at summary judgment.[3] Rather, quoting *Iqbal* and using language straight out of *Twombly*—"plausibly suggesting (not merely consistent with)" agreement, cf. 550 U.S. at 557—the court of appeals did just what this Court did in *Twombly*. It assessed whether allegations that defendants' parallel conduct was inconsistent with their unilateral economic incentives

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[2] Petitioners purport to quote the court of appeals' holding twice. The first time, they leave out quotation marks in the original and make no reference to the fact that the court of appeals was quoting from *Iqbal*. Compare Pet. 16 with App. 26a. The second time, they replace some of the language from *Iqbal* with an ellipsis and assert that the court of appeals "misquoted the relevant part" of *Iqbal*. Pet. 24.

[3] Petitioners assert that "[a]cademic observers have also concluded that this case erroneously applied the summary judgment standard." Pet. 23 n.7, citing Lee Goldman, *Trouble for Private Enforcement of the Sherman Act: Twombly, Pleading Standards, and the Oligopoly Problem*, 2008 B.Y.U.L.Rev. 1057, 1090. The cited article refers to the district court's opinion, however, and does not mention the decision of the court of appeals. See Goldman, 2008 B.Y.U.L.Rev. at 1090.

plausibly suggested (and was not merely consistent with) agreement.[4]

In *Twombly*, plaintiffs alleged that local telephone companies had natural economic incentives to expand into one another's historic territories following a change in regulatory policy and their parallel failure to do so was "strongly suggestive of conspiracy." 550 U.S. at 567. This Court rejected the *Twombly* plaintiffs' logic, observing that "an obvious alternative explanation" and a "natural explanation for the noncompetition alleged is that the former Government-sanctioned monopolists were sitting tight, expecting their neighbors to do the same thing." *Id.* at 567–68.

Here, the amended complaint alleges that it would be against an airline's economic self-interest to attempt to cut its costs without first colluding with its competitors because whichever airline moved first would lose revenue to its rivals. App. 109a–112a, ¶¶ 81–89. Just as this Court assessed the allegations in *Twombly* regarding the telephone companies' economic incentives, the court of appeals assessed petitioners' allegations of an airline's economic incentives. The court of appeals determined that it was natural for an airline to seek to reduce its costs and that the risk of lost revenue was far outweighed by the magnitude of the potential savings. See App. 24a–30a.

Although the court of appeals cited to *Monsanto* and to its decision in *Re/Max International, Inc.* v. *Realty One, Inc.*, 173 F.3d 995 (6th Cir. 1999), apply-

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[4] Like the district court, the court of appeals also considered the transcript of a deposition expressly referenced in the first amended complaint. See App. 27a–29a.

ing the *Monsanto* standard, it was careful to note that *Re/Max* "was an appeal from a grant of summary judgment. Here, our review is constrained by Fed. R. Civ. P. 12(b)(6)." App. 23a n.7.

Thus, the court of appeals' decision simply applies the standards set forth in *Twombly* and *Iqbal* to a different set of facts. It does not present the first question petitioners ask this Court to consider—whether a complaint must allege facts that "tend to exclude the possibility that defendants acted independently."[5] And petitioners fail to demonstrate an urgent need for the Court to revisit the issues decided in *Twombly* and *Iqbal*.

Further, even if there were a reason to revisit the issues decided in *Twombly* and *Iqbal*, the odd procedural posture of this case makes it a poor vehicle for developing guidance to the lower courts on how to interpret and apply those precedents. When drafting the amended complaint, petitioners had the unusual benefit of full discovery from the *Hall* action, plus additional discovery in this action. These are far from the circumstances under which most complaints alleging a violation of § 1 are drafted and assessed.

In addition, when the motion to dismiss was argued before the district court, petitioners consented

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[5] While there is much to commend a rule that a § 1 complaint must allege facts that tend to exclude the possibility of independent action, this case does not provide a good vehicle for the Court to consider whether to adopt such a rule. Unlike in *Starr*, where defendants expressly argued for adoption of such a rule, respondent airlines here did not even cite *Monsanto* in their brief below. And when respondent airlines cited to *Re/Max* they made no mention of the "tends to exclude" standard. Brief of Defendants-Appellees at 29, 61–62, *Tam Travel*, No. 07-4464 (6th Cir. June 26, 2008).

to the court's consideration of the transcript of a deposition already taken in this action. Under Federal Rule of Civil Procedure 12(d), a district court's consideration of discovery material or other "matters outside the pleadings" normally means that "the motion must be treated as one for summary judgment under Rule 56." Fed. R. Civ. P. 12(d). The oddity of the procedural setting here—in which the courts below applied the standard applicable to motions to dismiss even though "[t]he district court reviewed [a former airline employee's] deposition testimony in its entirety and carefully considered all of the factual allegations which, taken as true, could plausibly imply that defendants entered into a preceding agreement," App. 28a—makes this atypical case a particularly poor candidate for addressing any questions regarding the application of *Twombly* and *Iqbal* because Rule 12(d) would normally require application of the Rule 56 summary judgment standard in similar circumstances.

B. There Is No Reason For This Court To Review The Sixth Circuit's Decision Concerning the Effect Of United Air Lines' Bankruptcy.

Petitioners also ask the Court to review the Sixth Circuit's holding that confirmation of United's bankruptcy plan in January 2006 discharged their claims against United. Petitioners mistakenly claim that the issue is "independently worthy of review." Pet. 30. In fact, the bankruptcy issue cannot even be reached unless this Court also grants review of the first question presented and reverses the Sixth Circuit's application of the *Twombly* standard. The lower court's dismissal of the complaint for failure to satisfy the *Twombly* standard encompasses petitioners' claims against United. Thus, absent reversal on the

Twombly issue, those claims remain subject to dismissal regardless of the impact of United's bankruptcy.

In any event, certiorari is unwarranted on the bankruptcy issue because there is no conflict between the Sixth Circuit's holding and any decision of either this Court or any court of appeals. Indeed, even Judge Merritt's dissenting opinion took no issue with the panel's unremarkable holding that confirmation of a bankruptcy plan discharges claims that are dependent on pre-confirmation acts. Notably, neither the majority nor Judge Merritt suggested the existence of a division among the courts of appeals on this issue, and for good reason: no such division exists.

Striving mightily to conjure a conflict where none exists, petitioners assert (Pet. 32–33) that the Sixth Circuit's holding with respect to the effect of United's bankruptcy conflicts with the Fourth Circuit's decision in *In re Cotton Yarn Antitrust Litigation*, 505 F.3d 274 (4th Cir. 2007), and the Eleventh Circuit's decision in *Morton's Market, Inc.* v. *Gustafson's Dairy, Inc.*, 198 F.3d 823 (11th Cir. 1999).[6] But, significantly, neither *In re Cotton* nor *Morton's Market*—nor, for that matter, this Court's decision in *Klehr* v. *A.O. Smith Corp.*, 521 U.S 179 (1997), which petitioners also cite—involved the effects of a defen-

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[6] Although petitioners refer to a supposed conflict with the "Fourth and Eighth Circuits" (Pet. 30), they cite no Eighth Circuit decision. In fact, as we explain, the Eighth Circuit's decision in *International Paper Co.* v. *MCI WorldCom Network Services, Inc.*, 442 F.3d 633 (8th Cir. 2006) (per curiam), rejected the very theory upon which Petitioners rely. See *infra* at 13.

dant's bankruptcy. Instead, each of those cases concerned statute-of-limitations issues.[7]

Although the concept of claim accrual is common to both bankruptcy law and the principles governing statutes of limitations, it is well-established that "statute of limitations cases do not concern the same issues or the same principles" as cases, such as this, that involve the question of when a claim accrues "for bankruptcy purposes." *In re Edge*, 60 B.R. 690, 699 (Bankr. M.D. Tenn. 1986); see also *In re Envirodyne Indus., Inc.*, 214 B.R. 338, 350 n.3 (N.D. Ill. 1997); *In re Wis. Barge Lines, Inc.*, 91 B.R. 65, 67–68 (Bankr. E.D. Mo. 1988); cf. *Cusano* v. *Klein*, 264 F.3d 936, 947 (9th Cir. 2001) (distinguishing claim accrual for bankruptcy purposes from claim accrual for statute of limitations purposes); *In re Alvarez*, 224 F.3d 1273, 1276 n.7 (11th Cir. 2000) (same); *In re Swift*, 129 F.3d 792, 796 (5th Cir. 1997) ("These are two separate and distinct issues aimed at very different problems."). Thus, the mere fact that an antitrust claim may, by virtue of an "overt act," accrue at one time for statute-of-limitations purposes does not mean that the claim necessarily accrues at the same time for bankruptcy purposes.

The distinction between claim accrual for statute-of-limitations purposes and claim accrual for

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[7] Moreover, the statute-of-limitations discussion in *In re Cotton*—a case involving the enforceability of certain arbitration agreements—was mere dictum insofar as the court held that "[q]uestions about the timeliness of the action * * * will * * * be determined by the district court on remand." 505 F.3d at 292. Similarly dictum is the statement regarding overt acts and the statute of limitations that petitioners quote (Pet. 32) from *Klehr*, a civil RICO case that referred to antitrust actions only by analogy.

bankruptcy purposes arises from the fundamentally different policy considerations that animate the two areas of law. Statutes of limitations look backwards as "practical and pragmatic devices to spare the courts from litigation of stale claims, and the citizen from being put to his defense after memories have faded, witnesses have died or disappeared, and evidence has been lost." *Chase Secs. Corp.* v. *Donaldson*, 325 U.S. 304, 314 (1945). The bankruptcy laws, by contrast, look forward, to provide the reorganized entity with a "fresh start" free from the burden of "further liability for old debt." *Cent. Va. Cmty. Coll.* v. *Katz*, 546 U.S. 356, 364 (2006). Accordingly, in the bankruptcy context, "[i]t is important * * * to distinguish principles of accrual from principles * * * which may cause the statute of limitations to begin to run after accrual has occurred." *Cusano*, 264 F.3d at 947; see also *In re Alvarez*, 224 F.3d at 1276 n.7 (law governing running of the statute of limitations "is irrelevant" to claim accrual in the bankruptcy context). In practice, "the dates of [claim] accrual and the start of the running of the statute of limitations may vary greatly." *In re Swift*, 129 F.3d at 796; *In re Alvarez*, 224 F.3d at 1276 n.7. There is, therefore, no direct conflict between the Sixth Circuit's bankruptcy holding and the statute-of-limitations cases on which petitioners rely.

Implicitly recognizing the lack of any on-point bankruptcy authority to support their theory, petitioners attempt to bridge the gap with the Ninth Circuit's decision in *O'Loghlin* v. *County of Orange*, 229 F.3d 871 (9th Cir. 2000), which they contend "specifically applied the continuing violation doctrine to a violation that straddled the bankruptcy period, as here." Pet. 36. But petitioners misconstrue *O'Loghlin*—a case on which the Sixth Circuit actual-

ly relied in reaching its holding below. App. 10a. Unlike petitioners, who assert an antitrust claim that necessarily depends in large part on pre-bankruptcy conduct (see, *e.g.*, Compl. ¶¶ 26–108 (App. 93a–117a)), the plaintiff in *O'Loghlin* asserted claims under the Americans with Disabilities Act ("ADA") based on distinct pre- and post-discharge events that each *independently* fulfilled the elements of an ADA claim.[8] The Ninth Circuit held that the continuing nature of the violations did not prevent the defendant from being held liable for its post-discharge conduct because the defendant "would clearly be liable for a violation in the post-discharge period" without reference to its alleged "violat[ion of] the ADA during the pre-discharge period." 229 F.3d at 874–75. Here, by contrast, United's alleged post-discharge acts do not even arguably support a claim of an antitrust conspiracy unless they are combined with the allegations of United's pre-discharge conduct.

The circuits that have actually considered petitioner's "continuing violation" theory have rejected it and instead reached a conclusion similar to that of the Sixth Circuit in this case. For example, the Eighth Circuit in *International Paper Co.* v. *MCI WorldCom Network Services, Inc.* held that a bankruptcy confirmation discharged not only pre-confirmation claims for trespass based on the defendant's installation of fiber-optic cables on the plaintiff's land, but also post-discharge claims for a "continuing trespass" based on the defendant's continued use of the cables after confirmation. 442 F.3d 633,

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[8] O'Loghlin "allege[d] three separate episodes," the third of which occurred "after discharge" of the defendant's debts. *O'Loghlin*, 229 F.3d at 873.

635–36 (8th Cir. 2006) (per curiam). The Second Circuit in *In re WorldCom* recently held in a similar context that the "expansive scope of the Bankruptcy Code's definition of 'claim,'" combined with the lack of any relevant post-confirmation conduct aside from the defendant's "failure to remedy the trespass by removing the cables," mandated that any continuing trespass "claim was discharged by confirmation of [the defendant's] plan of reorganization." 546 F.3d 211, 220–21 & n.7 (2d Cir. 2008). The Second Circuit found *O'Loghlin* inapposite for the same reason that the case is inapplicable here: it involved liability for independent, post-discharge illegal conduct rather than the mere failure to reverse the effects of pre-discharge decisions. *Id.* at 221. In any event, even if *O'Loghlin* were on point, the Ninth Circuit considered it a "case of first impression" without any other "case precisely on point in this circuit or elsewhere." 229 F.3d at 874. To the extent any conflict could be construed, review should be withheld until other circuits have considered the issue.

Finally, petitioners' theory, even if indulged, fails on its own terms. Petitioners take issue with the Sixth Circuit's holding that the last overt act in the alleged conspiracy "occurred in 2002, long before United emerged from bankruptcy." App. 11a. According to petitioners (Pet. 31), United's failure to pay commissions after emerging from bankruptcy constitutes overt action in a "continuing violation," thereby allegedly creating post-discharge liability under *Klehr* and its progeny. But that argument is belied by the complaint, in which petitioners allege that United's failure to pay commissions after confirmation of its bankruptcy plan merely "ratified" and failed to "affirmatively disavow" the purported pre-discharge conspiracy. Compl. ¶¶ 118–119 (App.

118a). As Petitioners acknowledged before the Sixth Circuit, their theory is that United's failure to pay commissions after the discharge "reaffirmed its participation in the continuing conspiracy" that began before confirmation. Pet. for Reh'g at 14. That very theory was squarely rejected in *DXS, Inc.* v. *Siemens Medical Systems, Inc.*, 100 F.3d 462 (6th Cir. 1996), a case upon which *Klehr* relied for its summary of the law governing continuing antitrust violations. See *Klehr*, 521 U.S. at 189 (citing *DXS*). *DXS* restated the well-established principle that to give rise to a new cause of action (even for limitations purposes), an overt act "must be a new and independent act that is *not merely a reaffirmation of a previous act.*" 100 F.3d at 467 (emphasis added; internal quotation marks omitted); see also, *e.g.*, *Kaw Valley Elec. Coop.* v. *Kansas Elec. Power Coop.*, 872 F.2d 931, 933 (10th Cir. 1989); *Pace Indus., Inc.* v. *Three Phoenix Co.*, 813 F.2d 234, 238 (9th Cir. 1987). Thus, far from conflicting with the decision in this case, *Klehr* and its progeny rely on a line of authority holding—as did the panel below—that the "unabated inertial consequences" of a previous act do not cause a new claim to accrue. *DXS*, 100 F.3d at 467 (internal quotation marks omitted).

As the Sixth Circuit recognized, petitioners' continuing violation theory would lead to an "infinite" limitations period under which "an antitrust plaintiff could routinely salvage an otherwise untimely claim by asserting that it continues to lose revenue because of past alleged anticompetitive conduct." App. 11a–12a. Petitioners' theory would also reduce the "fresh start" promise of bankruptcy to a nullity by permitting plaintiffs to resurrect long-extinguished claims based on allegations that a debtor's post-discharge inaction somehow reaffirms or fails to remedy pre-

discharge conduct. Because petitioners find no support in existing law, and because the panel's decision does not conflict with any decision of this Court or any court of appeals, review of the bankruptcy issue is unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

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In The
Supreme Court of the United States

TAM TRAVEL, INC., *et al.*,

Petitioners,

v.

AMERICAN AIRLINES, INC., *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

SUPPLEMENTAL BRIEF OF PETITIONERS IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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Pursuant to Supreme Court Rule 15.7, petitioners Tam Travel, Inc, *et al.* ("Travel Agents") respectfully submit this supplemental brief in support of their petition for a writ of certiorari in order to call attention to new cases and other intervening matter not available at the time petitioners filed their reply brief on August 24, 2010. Specifically, recent developments in *Starr v. Sony BMG Music Entm't*, 592 F.3d 314 (2nd Cir. 2010) as well as decisions from the Supreme Court of Nebraska and a district court in Texas bear on the pending petition.

In their petition, Travel Agents identified a conflict between the decision below and this Court's decisions in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 554 (2007) and *Ashcroft v. Iqbal*, 556 U.S. ___, 129 S.Ct. 1937 (2009), as well as with decisions of the lower courts, most notably the Second Circuit's decision in *Starr* which held it was "incorrect" to require a complaint to allege facts that tend to exclude innocent explanations of defendants' conduct. *Starr*, 592 F.3d at 325; Pet. 18-19, 23. In their opposition, respondents did not contest that a decision requiring a complaint to exclude such explanations would establish a circuit conflict. Opp. 4. Instead, they opposed the petition by asserting that the Sixth Circuit's decision did not require the complaint to exclude defendants' explanations. Opp. 4-5. They argued that "the court of appeals below did *not* adopt the rule rejected in *Starr*," Pet. 4 (emphasis in original), that "[p]etitioners' claims of a conflict rest entirely on their recasting of the court of appeals' holding," Pet. 4-5,

and that "the court of appeals did just what this Court did in *Twombly*." Pet. 6. Petitioners argued in reply that respondents were alone in reading the Sixth Circuit's decision so benignly. In support, petitioners cited Judge Merritt's dissent, as well as lower court decisions which have interpreted the Sixth Circuit's decision as applying a "significantly-heightened pleading standard," *Dobyns v. United States*, 91 Fed.Cl. 412, 424 and n.29 (Ct. Fed. Cl. 2010) that requires courts to analyze the plausibility of defendants' explanations rather than the plausibility of the plaintiffs' claim. *Anderson News, LLC v. Am. Media, Inc.*, No. 09-2227, Slip. Op. at 12-14 (S.D.N.Y. Aug. 2, 2010), *available at* 2010 U.S.Dist.LEXIS 77718, *26-*31. Rep. 4-5.

Three recent developments show that the Sixth Circuit's decision in this case continues to be read in a way that conflicts with the decisions of this and other courts. First, on August 20, 2010, the defendants in *Starr* filed with this Court a petition for writ of certiorari in which they heavily relied on the "[ir]reconcil[able]" "modes of analysis in *Tam Travel* and [*Starr*]." Petition for a Writ of Certiorari at 25, *Sony Music Entm't v. Starr*, No. 10-263.[1]

Similarly, citing the Sixth Circuit's decision in an opinion issued on August 27, 2010, the Supreme

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[1] Both the petition here and the *Starr* petition have been scheduled for discussion at the Court's September 27, 2010 conference.

Court of Nebraska expressed a "concern[ ] that lower federal courts have interpreted the Court's plausibility standard as a heightened pleading standard," which "require[s] a complaint to contain specific factual allegations. . . ." *Doe v. Bd. of Regents*, 280 Neb. 492 (2010) (citing *In re Travel Agent Comm'n Antitrust Litig.*, 583 F.3d 896 (6th Cir. 2009)). Criticizing and rejecting these cases, including the Sixth Circuit's decision here, the Supreme Court of Nebraska noted that "[i]n *Twombly*, the Supreme Court specifically stated that it was not requiring 'heightened fact pleading of specifics.'" *Id.* (citing *Twombly*, 550 U.S. at 570).

Finally, a magistrate judge in *Escuadra v. GeoVera Specialty Ins. Co.*, No. 09-Civ-974 (E.D.Tex. Sep. 9, 2010), *available at* 2010 U.S.Dist.LEXIS 94301, *24-*30 & n.14, has cited the Sixth Circuit's decision as creating a conflict among the circuits' interpretations of *Twombly*. In *Escuadra*, the judge noted that while "[m]any courts, including the Fifth Circuit" hold that a "plaintiff's factual allegations (and associated inferences) need not tell a *more* plausible story than alternative explanations," "[o]ther federal appellate courts [including the Sixth Circuit's decision in this case], appear to embrace a more restrictive interpretation." *Id.* (citing *In re Travel Agent Comm'n Antitrust Litig.*, 583 F.3d 896, and explaining, "where defendants' explanation is 'just as likely' as plaintiffs' explanation, plaintiffs' claim is implausible") (emphasis in original).

Accordingly, contrary to respondents' assertion that the Sixth Circuit's decision here is a run-of-the-mill application of *Twombly*'s plausibility standard, recent developments show that the decision below continues to be read by courts and practitioners as an extreme interpretation that improperly imposes a heightened pleading standard in conflict with interpretations of this Court and other courts.

CONCLUSION

The petition for a writ of certiorari should be granted.

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REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

INTRODUCTION

The first issue in this case is whether the pleading standard announced in *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 556 U.S. ___, 129 S.Ct. 1937 (2009) requires a price-fixing conspiracy complaint to exclude plausible explanations of defendants' misconduct in order to survive a motion to dismiss. The Second Circuit in *Starr v. Sony BMG Entm't*, 592 F.3d 314, 325 (2nd Cir. 2010) rejected this rule, noting that it would result in the improper application of the summary judgment standard on a motion to dismiss. The Sixth Circuit in this case, on the other hand, adopted it, found that respondents had offered "especially plausible" explanations for their alleged misconduct, affirmed dismissal of the complaint, and created a direct conflict with decisions of the Second Circuit and of this Court. Respondent Airlines do not contest that the adoption of such a rule would create a direct conflict. Instead, they claim the court of appeals did not adopt the rule in question. But, the lower courts have already interpreted the majority's opinion as having created a "significantly-heightened pleading standard" which, as Judge Merritt put it, requires the complaint to "exclud[e] any possibility that the defendants acted independently."

The second issue in this case concerns whether each purchase of a price-fixed product constitutes an

overt act that triggers a new cause of action in the context of a continuing conspiracy to fix prices. This Court has been joined by the Fourth and Eleventh Circuits in answering this question affirmatively. But, parting with these decisions, the court of appeals in this case held that United Airlines' continued purchase of price-fixed travel services did not constitute overt acts. Unable to defeat the petition's showing of this conflict, the Airlines dodge the question by misstating the lower court's decision. They do not offer a single argument to defeat the petition's showing of a circuit conflict.

The decision of the court of appeals in this case threatens the unbiased and non-arbitrary service of justice. The need for clear, workable pleading standards cannot be denied. Certiorari is needed to resolve the conflicts in the circuits and bring needed conformity to the application of the antitrust laws.[1]

REASONS FOR GRANTING THE PETITION

I. The Conflict In Decisions Over Whether A Complaint Must Exclude Defendants' Plausible Explanations Is Squarely Presented

The court of appeals' decision in this case creates a conflict because it applies *Twombly*'s plausibility

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[1] Although Travel Agents believe that the petition and the opposition in and of themselves demonstrate the need for this Court's review, the Court may wish to invite the Solicitor General to express the views of the United States.

standard backwards. Rather than analyze the plausibility of the claim alleged in the complaint, it analyzes the plausibility of defendants' explanations for the conduct. These explanations are found nowhere in the pleadings; they are merely arguments "contend[ed]" and "assert[ed]" (App. 25a) by the Airlines' lawyers in the legal memoranda supporting the motion to dismiss. But, treating these arguments as though they were factual explications on summary judgment, the lower court found them "especially plausible" (App. 25a) and, applying a balancing test, it determined that Airlines' explanations better accounted for "defendants' conduct" then did the allegations in the complaint. The complaint failed therefore – not because the allegations *themselves* were deficient – but because it failed to rebut Airlines' "plausible" explanations of the misconduct.

Respondents do not dispute that the creation of such a rule would create a circuit conflict; they openly concede that the Second Circuit in *Starr* rejected precisely such a rule. Opp. 4. Instead, their argument against the existence of a conflict rests entirely on the contention that the decision "does not announce a rule that a complaint must allege facts that tend to exclude the possibility of independent action in order to survive a motion to dismiss for failure to state a claim...." Opp. 6.

Respondents misread the decision. They seek to cut the language of the holding out from the body of the opinion and analyze it separately and apart. But, by stating "we *therefore* hold," the holding itself rejects

respondents' reading and necessarily incorporates the language that comes before it. There, in the paragraph immediately preceding the holding, the Sixth Circuit analyzed the "plausibility" of explanations offered by Airlines' lawyers through "conten[tions]" and "assert[ions]" found in the legal memoranda supporting the motion to dismiss.[2] Making various quasi-factual findings and referring to them as "facts" (App. 26a), the majority ultimately determined that Airlines' explanations were "especially plausible," *id.*, and that "defendants have offered a reasonable, alternative explanation for their parallel pricing behavior." App. 26a. It was on that basis that the Sixth Circuit *held* that "the complaint failed to allege sufficient fact ... because defendants' conduct ... was more likely explained by" their *post hoc* explanations. App. 26a. Thus, the complaint failed to state a claim because it did not include allegations that excluded defendants' explanations. In so doing, the Sixth Circuit created a direct conflict with *Starr*, 592 F.3d at 325.

Respondents are alone in reading the decision as not requiring complaints to exclude the defendants' explanations. In dissent, Judge Merritt read the majority decision as having "seriously misapplied the new standard by requiring the plaintiff to present at the pleading stage a strong probability of ... excluding

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[2] Notably, earlier in the decision, the court had adopted the legal standard for summary judgment on the basis that it "illuminates the plausibility of defendants' lawful [explanations]." App. 23a, n.7.

any possibility that the defendants acted independently and not in unison." App. 34a. This interpretation has a wide-reach. In *Anderson News, LLC v. Am. Media, Inc.*, No. 09-2227, Slip op. at 12-14 (S.D.N.Y. Aug. 2, 2010), *available at* 2010 U.S.Dist.LEXIS 77718, *26-*31, an out-of-circuit district court interpreted the court of appeals' decision as requiring a complaint to exclude defendants' plausible explanations. Adopting the rule, it held:

> The reasoning in *Travel Agent* applies here. Just as the *Travel Agent* Court found it plausible that the airlines independently instituted commission cuts and adopted a wait-and-see approach, so too it is plausible that each of the publisher Defendants unilaterally stopped shipping magazines to Anderson rather than pay the Surcharge.

Id. at 13. Similarly, in *Dobyns v. United States*, 91 Fed.Cl. 412, 424 and n.29 (Ct. Fed. Cl. 2010), the court interpreted the Sixth Circuit's decision as having "worked a sea change" that established a fundamentally different "significantly-heightened pleading standard."

Airlines nevertheless contend that the Sixth Circuit "did just what this Court did in *Twombly*." Opp. 6. They are incorrect. In *Twombly*, the only allegation was that the defendants acted in parallel, 550 U.S. at 556-57; the complaint did not allege any facts explaining the "*need* for joint encouragement to resist the 1996 Act...." *Id.* at 566 (emphasis added). When the *Twombly* Court observed an "obvious

alternative explanation" for the Baby Bells' parallel conduct, 550 U.S. at 567, it was not *weighing* that explanation against contrary allegations in the complaint, since there were none; it was merely explaining through example the "ambiguity of" unadorned "parallel conduct." *Id.* at 554. The complaint here, on the other hand, alleges specific facts to support allegations that joint action *was* necessary for the commission cuts to stick (App. 110a (¶85)), *why* it was necessary for the airlines to act jointly, and *why* no rational airline would act independently. App. 109a-112a (¶¶81-89). The court of appeals simply chose to weigh admittedly well-pleaded allegations against competing argumentative explanations. This is nothing like what this Court did in *Twombly*.

Airlines offer no explanation as to why the court of appeals' discussion of the applicable law was restricted to an analysis of the summary judgment standard in *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752 (1984) and *Re/Max Int'l, Inc. v. Realty One, Inc.*, 173 F.3d 995 (6th Cir. 1999). App. 22a-24a. They meekly support the Sixth Circuit's citation to *Monsanto* by saying the majority "correctly" identified "the modern standard to evaluate evidence bearing on concerted action." Opp. 5. There was nothing correct about identifying the *Monsanto* standard; evidence is not to be evaluated at the complaint stage. Moreover, the court of appeals not only failed to disclaim *Monsanto*'s inapplicability, it italicized the essential part of the rule. App. 22a. In fact, while respondents point out that the court of appeals claimed it was

constrained by Rule 12(b)(6) (App. 23a, n.7), it nevertheless specifically justified use of the summary judgment standard on the grounds it "illuminates the plausibility of defendants' lawful [explanations]." App. 23a, n.7.

The uncertainty surrounding application of the *Twombly* and *Iqbal* standards persists. Edward D. Cavanagh, *The Private Antitrust Remedy: Lessons from the American Experience*, 41 LOY.U.CHI.L.J. 629, 645 (Spring 2010) (citing *Tam Travel*, 583 F.3d at 908-09). "The problem is that [those cases] contain few guidelines to help the lower courts discern the difference between a 'plausible' and an implausible claim...." *Riley v. Vilsack*, 665 F.Supp.2d 994, 1003 (W.D.Wis. 2009); *Dobyns*, 91 Fed.Cl. 412 at 424-25 (categorizing the "disparate judicial thinking on this subject ... arrayed over a spectrum"). This case is an ideal vehicle for the Court to further develop the standard. *Twombly* and *Iqbal* provided factual scenarios that framed the issue in terms of what failed to state a claim. What is needed now is an example of what succeeds in stating a plausible claim. Like *Twombly*, this is a price-fixing case that relies on circumstantial evidence to prove conspiracy; as such, it will provide a much-needed "apples to apples" comparison of successful and unsuccessful plausible allegations.

Airlines contend that this case is aberrant because "petitioners had the unusual benefit" of discovery. Opp. 8. In fact, the opposite is true, since the discovery gives the complaint extraordinarily robust

allegations, including "specific, time-and-place factual allegations" (App. 37a), that "clearly satisf[y] the *Twombly* standard," and make this "an overwhelming case for a plaintiff to get by a motion to dismiss" (App. 36a) let alone a motion under 12(b)(6). Airlines also suggest that the district court's consideration of a deposition transcript makes this case less than ideal, "because Rule 12(d) would normally require application of the Rule 56 summary judgment standard in similar circumstances." Opp. 9. The argument merely draws a greater comparison between this case and *Twombly*; the district courts in both cases properly considered extra-pleading material that had been incorporated into the complaint. App. 111a (¶87); *Twombly*, 550 U.S. at 569, n.13.

II. The Conflict In Decisions Over Whether The Purchase Of A Price-Fixed Service Is An "Overt Act" Is Squarely Presented

The issue presented in the petition is whether United committed "overt acts" in furtherance of the conspiracy each time it purchased price-fixed travel services. Pet. i. But unwilling or unable to address this issue, Airlines pose a different question, "[w]hether under 11 U.S.C. §1141(d)(1) confirmation of a defendant's bankruptcy plan discharges an antitrust claim that is predicated on pre-confirmation conduct." Opp. i. The answer to their question is, clearly, yes. An antitrust claim, indeed any claim, predicated entirely on pre-confirmation conduct is discharged. But that is not the issue presented here.

Travel Agents do not seek damages for injuries sustained from "pre-confirmation conduct." Rather, they seek damages for injuries sustained from acts United took *after* it emerged from bankruptcy.

Respondents hinge their opposition on a misrepresentation of the holding in this case. Without citation to the decision, they claim the "unremarkable holding" here is that "confirmation of a bankruptcy plan discharges claims that are dependent on pre-confirmation acts." Opp. 10. In fact, the court of appeals held nothing close to that. The Sixth Circuit, framing the issue solely in terms of whether United committed a "continuing antitrust conspiracy" under the doctrine established by this Court in *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 338 (1971), limited its holding to determining whether United committed "overt acts" that resulted in the accrual of new causes of action. Thus, without a single reference to 11 U.S.C. §1141, the Sixth Circuit held:

> Here, we reject plaintiffs' attempt to characterize United's decision to maintain its 0% commission policy as an overt act. "Since the Supreme Court decided *Zenith*, federal courts have uniformly defined a continuing antitrust violation as one in which the plaintiff's interests are repeatedly invaded." Although United's participation in the alleged conspiracy would certainly create a rippling effect, plaintiffs assert that United's final act to effectuate that conspiracy occurred in

> 2002, long before United emerged from bankruptcy.

App. 11a (citation omitted). Bankruptcy law plays no part in this holding. It relies exclusively on the application of *Zenith*'s continuing conspiracy doctrine and an "overt act" as defined in *Klehr v. A.O. Smith Corp.*, 521 U.S. 179 (1997). Therefore, respondents' initial argument that none of the decisions identified in the petition "involved the effects of a defendant's bankruptcy" (Opp. 10-11) proves nothing.

Respondents spend two pages explaining the difference between claim accrual in the bankruptcy and statutes of limitations setting to argue "the mere fact that an antitrust claim may, by virtue of an 'overt act,' accrue at one time for statute-of-limitations purposes does not mean that the claim necessarily accrues at the same time for bankruptcy purposes." Opp. 11. But, when the majority "reject[ed] plaintiffs' attempt to characterize United's decision to maintain its 0% commission policy as an overt act" (App. 11a), it did so within the context of the continuing conspiracy doctrine in *Zenith* – a statute of limitations case. Thus, respondents' premature merits argument attacks the Sixth Circuit's reasoning, not the existence of a circuit split. So, while respondents may argue that the Sixth Circuit should have applied different rules,[3]

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[3] Respondents are wrong on the merits, too. They greatly exaggerate as "well-established" the proposition that "statutes of limitations cases do not concern the same issues or the same principles" as cases involving claim accrual in bankruptcy. Opp.

(Continued on following page)

that argument does nothing to defeat the petition's showing of a conflict in how the Sixth Circuit applied the rules it did. If anything, respondents' argument offers another reason to review the decision.

The only time respondents mention the continuing conspiracy doctrine is their argument that two continuing trespass cases in the Eighth and Second Circuits have "reached a similar conclusion to that of the Sixth Circuit in this case." Opp. 13. But, this too is an irrelevant merits argument. Respondents badly misrepresent that *Int'l Paper Co. v. MCI WorldCom Network Servs., Inc.*, 442 F.3d 633, 635-36 (8th Cir. 2006) (per curiam) "held" "that a bankruptcy confirmation discharged ... post-discharge claims for a

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11. The quoted passage refers only to specific Tennessee state cases. *In re Edge*, 60 B.R. 690, 699 (Bankr.M.D.Tenn. 1986). In truth, respondents' cases only say that statutory limitation periods "do not necessarily" address the same issues as bankruptcy claim accrual. *In re Envirodyne Indus.*, 214 B.R. 338, 350 (N.D.Ill. 1997). In fact, respondents cases show that the accrual of a cause of action for purposes of *either* bankruptcy *or* statutes of limitation is triggered by the commission of an "act" that injures the plaintiff. Thus, "[t]he majority of ... courts" have held that "the claim ... arises for bankruptcy purposes at the time of *the act giving rise to the claim.... In re Wis. Barge Lines, Inc.*, 91 B.R. 65, 67-68 (Bankr.E.D.Mo. 1988) (emphasis added); *O'Loghlin v. County of Orange*, 229 F.3d 871, 874 (9th Cir. 2000) (adopting rule); *McSherry v. Trans World Airlines, Inc.*, 81 F.3d 739, 741 (8th Cir. 1996) (same). Likewise, in a continuing antitrust conspiracy, a new cause of action accrues "each time a plaintiff is injured by an act of the defendants...." *Zenith*, 401 U.S. at 338. Here, applying either statutes of limitations law or bankruptcy law, the purchases United made after it emerged from bankruptcy created *post-discharge* causes of action.

'continuing trespass' based on defendant's continued use of the cable." Opp. 13. Actually, the court did not hold that the post-discharge claims were discharged; it held there were *no* post-discharge claims at all, because "intangible" light is not capable of trespass. *Id.* at 636. Similarly, the continuing trespass theory failed in *In re WorldCom, Inc.*, 546 F.3d 211, 221 (2nd Cir. 2008), because "all the necessary elements were complete" pre-discharge and "plaintiff fail[ed] to allege any relevant post-confirmation conduct." *Id.* at 220, 221 n.7. These cases offer no guidance in determining the existence of a circuit conflict. They merely hold that a viable continuing violation must include post-confirmation acts, and the very question presented here is whether United's purchases constitute such acts.

Airlines complete their opposition with yet another irrelevant argument on the merits, claiming that *DXS, Inc. v. Siemens Med. Sys., Inc.*, 100 F.3d 462 (6th Cir. 1996) "squarely rejected" the "very theory" Travel Agents espouse here. Opp. 15. They fail to provide a pin cite for this supposed "rejection," because there is none – *DXS* says nothing about whether price-fixed purchases are overt acts because it did not involve a price-fixing conspiracy. Airlines recite in bold print *DXS*'s statement that an overt act "must be a new and independent act that is not merely a reaffirmation of a previous act." Opp. 15 (emphasis omitted). But, this argument begs the question. The issue to be decided on the petition is not whether the purchase of a price-fixed product is

the reaffirmation of a previous act – the issue is whether the Sixth Circuit's conclusion to that effect conflicts with the contrary holdings of this Court, and the Fourth and Eleventh Circuits. On that point – in fact on any point concerning the circuit conflict identified in the petition – respondents' opposition says nothing at all.[4]

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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[4] Respondents are wrong on the merits, too. The only antitrust cases that have applied the "reaffirmation" language have been "refusal to deal" cases, like those cited by respondents. Opp. 15. Not a single price-fixing case has applied this language to the purchase of a price-fixed service.